Nos. 08-289, 08-294

In The Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES AND PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, INDIVIDUALLY AND AS PARENT OF MIRIAM FLORES, MINOR CHILD; ROSA RZESLAWSKI, INDIVIDUALLY AND AS PARENT OF MARIO RZESLAWSKI, MINOR CHILD; STATE OF ARIZONA; AND MEMBERS OF THE ARIZONA STATE BOARD OF EDUCATION IN THEIR OFFICIAL CAPACITIES,

Respondents.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

INTRODUCTION 2

STATUTORY BACKGROUND 4

I. The Equal Educational Opportunities Act... 4

II. The No Child Left Behind Act 7

SUMMARY OF ARGUMENT 11

ARGUMENT 12

I. Congress Never Intended for NCLB to Preclude Civil Rights Actions Brought Under the EEOA 12

A. There is no Evidence of Congressional Intent in NCLB to Preclude EEOA Causes of Action 13

1. Congress Never Considered the Private Right of Action Under the EEOA 14

2. The Courts Have Developed a Working Definition of "Appropriate Action" That Fulfills the Purpose of the EEOA 15

B. NCLB and the EEOA Work in Harmony 17

C. Congress Never Intended to Repeal or Otherwise Preclude Actions Under the EEOA for Individuals Against States... 18

TABLE OF CONTENTS – Continued

Page

II. Petitioners Overstate the Operation and Remedial Scheme of NCLB 21

A. NCLB is Subject to Re-authorization ... 22

B. Petitioners Concede Various Aspects of "Appropriate Action" Under the EEOA Were Neither Required by NCLB Nor Approved by the USDOE 23

C. In Contrast to the EEOA, NCLB Does not Address Equal Opportunity for All Parts of an Educational Program 24

D. The Accountability Provisions of NCLB Exclude Thousands of ELL Students ... 25

1. NCLB's Provisions Exclude Large Numbers of ELL Students due to Grade Exclusion 27

2. When There are Fewer Than 40 Students in the ELL Group, Arizona ELL Students Are Excluded for Accountability Purposes 29

3. Arizona's Application of a 99% Confidence Level Further Excludes ELL Students for Accountability Purposes 32

4. The Meaning of "Making Adequate Yearly Progress" Does not Necessarily Equate to Success for all ELL Students..... 34

TABLE OF CONTENTS – Continued

Page

5. Not all School Districts with ELL Students Participate in Title III Funded Programs 36

E. Many ELLs Who are Failing to Demonstrate Proficiency on State Assessments are in Districts and Schools Satisfying all the Accountability Requirements of NCLB 37

III. Petitioners' Interpretation of the EEOA Would Embroil the Court in Oversight of NCLB 38

CONCLUSION 41

TABLE OF AUTHORITIES

Page

CASES

American Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991) 14

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Fitzgerald v. Barnstable, 129 S. Ct. 788 (2009) 13, 16, 17, 21

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Harrison v. PPG Indus., 446 U.S. 578 (1980) 15

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TABLE OF AUTHORITIES – Continued

Page

STATUTES

Bilingual Education Act 10

EEOA as Title II to the Educational Amendments Act of 1974 (Pub. L. No. 93-380, title II, 88 Stat. 515 (1974)) 10, 16

20 U.S.C. § 1226 22

20 U.S.C. § 1234 9

20 U.S.C. § 1703 ..... *passim*

20 U.S.C. § 1706 7

20 U.S.C. § 6301 ..... 7, 10

20 U.S.C. § 6311 ..... *passim*

20 U.S.C. § 6314 9

20 U.S.C. § 6316 ..... 26, 34

20 U.S.C. § 6812 ..... 8, 24

20 U.S.C. § 6821-6826 8

20 U.S.C. § 6823 10

20 U.S.C. § 6824 36

20 U.S.C. § 6825 9

20 U.S.C. § 6842 ..... 8, 26

20 U.S.C. § 6847 ..... 11, 12

20 U.S.C. § 6913 10

20 U.S.C. § 6914 10

20 U.S.C. § 6951 10

TABLE OF AUTHORITIES – Continued

Page

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20 U.S.C. § 7121 10

20 U.S.C. § 7801 25

20 U.S.C. § 7902 2

REGULATIONS

34 C.F.R. § 200.20 24

34 C.F.R. § 200.55(c) 25

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Page

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Page

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Page

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Page

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Page

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STATEMENT OF INTEREST[1]

Amici are various civil rights organizations and public interest centers whose efforts include litigation, public policy and general advocacy to protect the civil rights of persons to equal educational opportunities. The *amici* include the Mexican American Legal Defense and Educational Fund (MALDEF), the Multicultural Education, Training & Advocacy, (META) Inc., LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund), Public Advocates, the Earl Warren Institute on Race, Ethnicity & Diversity and the Education Law Center. Each *amicus* has experience in securing the rights of English Language Learner ("ELL") students to access appropriate language programs and has a substantial interest in the outcome of this case. The individual statements of interest of all *amici* appear in the Appendix.

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[1] Respondent Flores filed a letter consenting to the filing of this brief with the Clerk of the Court. Respondent State of Arizona and Petitioners have signed letters consenting to the filing of this brief and those letters are being filed with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

This is a school finance case involving how Arizona finances public education for ELL students. As the court of appeals summarized, "The particulars of Arizona's school funding system are therefore at the heart of this case."[2] In sum, the district court issued a series of orders requiring Arizona to conduct a study of the costs of educating ELL students and to fund programs rationally related to the costs required for those students. Arizona's most recent response to these orders is an enactment known as HB 2064, which the court of appeals has found to have two specific flaws.[3]

Amici file this brief focusing on Petitioners' far-reaching argument that Arizona's compliance with provisions of the Elementary and Secondary Education Act (the "No Child Left Behind Act" or "NCLB") satisfies their obligation to take "appropriate action" under the Equal Educational Opportunities Act ("EEOA"). Petitioners advance baseless arguments by

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[2] *Flores v. Arizona*, 516 F.3d 1140, 1147 (9th Cir. 2008). The detailed history of the litigation is found in the opinion of the court of appeals. *Id.* at 1140-1154.

[3] The court found that the "clearest violation of federal law" pertained to the state's violation of 20 U.S.C. § 7902 which provides that in determining a school district's eligibility for state aid, a state may not take into account federal funds. *Id.* at 1178. Petitioners did not address the 20 U.S.C. § 7902 issue in their briefs. The court of appeals also found that a two-year limitation on state ELL aid was irrational. *Amici* agree with the court on both counts.

misreading provisions of NCLB in a way that undercuts 30 years of federally-protected civil rights for millions of ELL school children across the country. As of the 2005-2006 school year, there were more than five million ELL students attending schools in the U.S., a 57.17% increase over the past decade.[4]

While Petitioners supposedly seek judicial noninterference with local control, the implications of their argument would plunge the federal courts into greatly expanded involvement in day-to-day educational policy decisions. *Amici* respectfully request that the Court refuse this intrusive invitation and affirm the decision of the courts below.

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[4] National Clearinghouse for English Language Acquisition and Language Instruction Educational Programs, *The Growing Numbers of Limited English Proficient Students 1995/96-2005/06*, *available at* http://www.ncela.gwu.edu/policy/states/reports/statedata/2005LEP/GrowingLEP_0506.pdf. Spanish is the language of approximately 80% of these students. U.S. Dep't of Education Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students, *The Biennial Report to Congress on the Implementation of the Title III State Formula Grant Program, School Years 2004-06* (June 2008), *available at* http://www.ed.gov/about/offices/list/oela/title3biennial0406.pdf.

STATUTORY BACKGROUND

I. The Equal Educational Opportunities Act

The EEOA was born from President Nixon's address to the nation on March 16, 1972, in which he proposed a new law that "would further establish an educational bill of rights for [those] who start their education under language handicaps, to make certain that they, too, will have equal opportunity." President Nixon, Address to the Nation on Equal Educational Opportunities and School Busing, 1972 Pub. Papers 425 (Mar. 16, 1972).

President Nixon affirmed that this goal could only be achieved if ELL students are included in the learning process: "School authorities must take appropriate action to overcome whatever language barriers might exist, in order to enable all students to participate equally in educational programs." President Nixon, Special Message to Congress on Equal Educational Opportunities and School Busing, 118 Cong. Rec. 8931 (Mar. 17, 1972). He further clarified that the educational opportunity afforded to all schoolchildren must "not only [be] equal, but adequate." *Id.*

Days later, the EEOA was introduced in the U.S. House of Representatives and stated that "[n]o state shall deny equal educational opportunity to an individual on account of his race, color, or national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its

instructional programs." 118 Cong. Rec. 9012 (Mar. 20, 1972); H.R. 13915 § 201(f). Regarding the EEOA's explicit requirement that states eliminate language barriers for ELL students, the committee hearing the bill explained:

> [T]he committee bill for the first time in Federal Law contains an illustrative definition of a denial of equal educational opportunity. It is the purpose of that definition . . . to provide school and governmental authorities with a clear delineation of their responsibilities to their students and employees and to provide the students and employees with the means to achieve enforcement of their rights.

House Comm. on Educ. and Labor, H.R. Rep. No. 92-1335, at 3 (1972).

The Committee recognized that the statute, among other purposes, was designed to ensure that ELL students received equal educational opportunities. "As President Nixon has stated, these children will not have true equality of educational opportunity until these language . . . barriers are removed." *Id.* at 6. Speaking prior to this Court's decision in *Lau v. Nichols*, 414 U.S. 563 (1974), Rep. Veysey recognized that the EEOA:

> establishes for the first time an express requirement that schools take affirmative action to overcome language barriers that impede equal participation by students. This provision especially aids [those] whose language and cultural barriers have been ignored

> for far too long. Provisions like this are essential to achieving true equality of educational opportunity for all our citizens.

118 Cong. Rec. 28865 (Aug. 17, 1972).[5]

Congress ultimately enacted the EEOA as Title II to the Educational Amendments Act of 1974 (Pub. L. No. 93-380, title II, 88 Stat. 515 (1974)), shortly after this Court's decision in *Lau v. Nichols*, 414 U.S. 563 (1974). There, the Court stated:

> Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful.

Id. at 569 (1974) (citing, *inter alia*, Office of Civil Rights regulations and policies requiring school districts to take affirmative steps to rectify English language deficiencies of their students so that they may participate effectively in public educational programs).

Congress also included an enforcement component, providing a private right of action for students to enforce their civil rights when states or school

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[5] The 1972 bill, as set forth in H.R. 13915, passed the House, but was ultimately defeated in the Senate.

districts fail to take "appropriate action" to remove existing "language barriers." 20 U.S.C. § 1706. Congress' inclusion of a private right of action to allow ELL students to bring suit to remove language barriers reflects Congress' recognition that the EEOA established for the courts, in President Nixon's words, a "new and broader base on which to decide future cases" involving educational civil rights. President Nixon, Special Message to Congress on Equal Educational Opportunities and School Busing, *supra*.

II. The No Child Left Behind Act

NCLB is an educational funding authorization statute that requires states that accept federal funds under the Elementary and Secondary Education Act ("ESEA") for public education to comply with certain accountability measures designed to improve "the academic achievement of all students." 20 U.S.C. § 6301(4). The major provisions addressing ELL academic achievement are Titles I and III, which contain an overlapping accountability framework for monitoring ELL educational progress in English Language Arts ("ELA") and math.

Title I requires that districts and schools, as a condition of receipt of Title I funds, make "Adequate Yearly Progress" ("AYP") for all students, including for various identified subgroups, such as ELLs. AYP is primarily determined by the percentage of students

overall, as well as in each subgroup, who score "proficient" on state ELA and math assessments. 20 U.S.C. § 6311(b)(2)(B)-(C).

Title III of NCLB, a statutory grant program known as the English Language Acquisition, Language Enhancement and Academic Achievement Act ("Title III"), is specifically designed to provide funds to "help ensure that children who are limited English proficient . . . attain English proficiency . . . and meet the same challenging State academic content and student achievement standards as all children are expected to meet." 20 U.S.C. § 6812(1). Title III grants aid to states upon receipt of plans approved by the federal government. *See id.* at §§ 6821-6826. Title III incorporates Title I AYP accountability for ELLs by requiring that Title III-funded districts meet AYP for ELLs, in addition to meeting objectives demonstrating ELL progress in learning English. 20 U.S.C. § 6842(a).[6]

The text of NCLB demonstrates that Title III was conceived to act as a gradual means to improve ELL achievement in English and mathematics. 20 U.S.C. §§ 6311(b)(2)-(3), 6842(a)(3). In contrast to the immediate, rights-based framework of the EEOA, NCLB's accountability measures that require adequate yearly progress for ELL children threaten only removal of

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[6] However, the parental accountability and program improvement provisions of Title I do not apply to the progress in learning English provisions of Title III.

federal funding. Indeed, the statute merely authorizes and does not guarantee federal funding for these programs; its effectiveness is thus tied to available funds.

As a result, Title III specifically instructs that federal funds provided to states under NCLB shall be used only to "supplement" funds already earmarked by states for ELL programs; supplanting pre-existing public funds is prohibited. 20 U.S.C. § 6825(g). 20 U.S.C. § 6314(a)(2)(B) expressly states that:

> A school participating in a schoolwide program shall use funds available to carry out this section only to supplement the amount of funds that would, in the absence of funds under this part, be made available from non-Federal sources for the school, including funds needed to provide services that are required by law for children with . . . limited English proficiency.

Id. The statute goes on specifically to state that a "school that chooses to use funds from such other programs shall not be relieved of the requirements relating to . . . civil rights [and] uses of Federal funds to supplement, not supplant non-Federal funds. . . ." *Id.* § 6314(a)(3)(B). Violation of this requirement may lead to the loss of all federal funds. *Id.* § 1234(a)-(i). Likewise, the predecessor of Title III, the Bilingual Education Act, contained similar "supplement" not "supplant" funding requirements which persisted through five amendments over three decades, attesting to Congress' long-standing, consistent dedication

to ensuring that states honor their educational civil rights obligations to their students independently of Title III or its predecessor statute.[7]

NCLB expressly states that it does not amend or repeal any statutes other than the ESEA. 20 U.S.C. § 6301. Furthermore, the text of both Title III of NCLB and its predecessor show that they are meant to work in conjunction with other ELL programs administered by the Department of Education to maximize federal efforts aimed at serving ELL children.[8]

NCLB also has purely administrative mechanisms for remedying state and local deficiencies in meeting its standards. *See Newark Parents Ass'n v. Newark Pub. Sch.*, 547 F.3d 199, 209 n.5 (3d Cir. 2008). At the same time, it contains a savings clause: "Nothing in this part shall be construed in a manner

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[7] Under the Bilingual Education Act, federal funds were required to be allocated to supplement and, to the extent practicable, increase the level of state and local funds made available – but in no case supplant such funds. *See* Public Law 90-247 (Jan. 2, 1967), § 705(a)(4); Public Law 93-380 (August 21, 1974), § 721(b)(3)(A); Public Law 95-561 (Nov. 1, 1978), § 721 (b)(3)(G); Public Law 98-511 (Oct. 19, 1984), § 721(f)(4); Public Law 100-297 (Apr. 28, 1988), § 7032(e); Public Law 103-382 (1994), §§ 7116(h)(4), 7134(f).

[8] *See* 20 U.S.C. §§ 6823, 6913, 6914, 6951, 6965, 6983; Public Law 100-297, Sec. 7051 (Apr. 28, 1988). Coordination of Title VII education programs with other programs, including the Goals 2000: Educate America Act and other Acts to "secure the most flexible and efficient use of Federal funds" was also envisioned. *See id.* at § 7121.

inconsistent with any federal law guaranteeing a civil right." 20 U.S.C. § 6847.

SUMMARY OF ARGUMENT

Congress never intended for a state's compliance under NCLB to substitute for an obligation under the EEOA to take appropriate action to overcome language barriers. Petitioners fail to cite any legislative history of NCLB to indicate such congressional intent or any intent to eliminate ELL students' private right of action to sue states under the EEOA. On the contrary, Congress expressly noted its intent to preserve ELL students' private right of action by including a savings clause in NCLB for protection of civil rights under federal laws, such as the EEOA.

Furthermore, NCLB is not the all-encompassing, comprehensive statute suggested by Petitioners. NCLB is a statute whose authorization has lapsed and whose future is unknown. Nonetheless, Petitioners ask this Court to equate the EEOA to the current version of NCLB, which neither covers the entire instructional program nor requires "appropriate actions" such as trained English as a Second Language teachers or state monitoring of ELL programs. Under NCLB, nearly half the ELL students in Arizona and California are not counted for accountability purposes because they are in grades K-2 or 9, or found in subgroups of fewer than 40 (or, in California, 100) or attend high schools which do not receive

ESEA/NCLB funding. The use of various statistical devices allows schools and the State of Arizona to meet AYP under NCLB even though most of their ELL students are not proficient in reading or mathematics. For that subset of schools not receiving Title I federal funding and for Title III-funded districts generally, the parental accountability requirements of the NCLB do not apply.

Finally, Petitioners unnecessarily invite the federal courts to become embroiled in detailed oversight of what it means to comply with NCLB statute. Should the Court accept Petitioners' argument, federal judges will be tasked with the responsibility of determining whether varying degrees of NCLB "compliance" among the states meet the statutory requirements and Congressional intent of NCLB and whether states are taking appropriate action under the EEOA.

ARGUMENT

I. Congress Never Intended for NCLB to Preclude Civil Rights Actions Brought Under the EEOA

In drafting NCLB, Congress inserted a savings clause to preserve existing civil rights under other federal laws, including the right of ELL students to equal educational opportunities under the EEOA. *See* 20 U.S.C. § 6847. Nevertheless, Petitioners ask the

Court to conclude that Congress chose to allow states to comply with NCLB instead of requiring appropriate action under the EEOA without Congress saying so. Such an interpretation would erroneously lead to the repeal of the ELL individual's right of action under the EEOA against state defendants. Such repeals are disfavored. *See Morton v. Mancari*, 417 U.S. 535, 549 (1974). Indeed, this Court has stated repeatedly that the central question in deciding whether one statute precludes a cause of action in a preceding statute is whether Congress intended it to do so. *Fitzgerald v. Barnstable*, 129 S. Ct. 788, 793-94 (2009). Petitioners have failed to present any cogent argument or evidence demonstrating such congressional intent.

A. There is no Evidence of Congressional Intent in NCLB to Preclude EEOA Causes of Action

The crux of Petitioners' argument is that Congress enacted NCLB to fulfill the obligations of states to take "appropriate action" under the EEOA. However, Petitioners' argument contradicts basic canons of statutory interpretation because Petitioners cannot point to any evidence that Congress ever considered the EEOA's requirements when drafting and adopting the NCLB – with the lone exception, vitiating Petitioners' position, of Congress' inclusion of its savings clause in NCLB. In addition, the EEOA's private right of action has allowed the lower courts to develop standards for measuring "appropriate action" under

the EEOA congruent with its principal purpose of protecting the civil rights of ELL students to access equal educational opportunities and overcome language barriers. *See, e.g., Castaneda v. Pickard,* 648 F.2d 989, 1009 (5th Cir. 1981); *Gomez v. Illinois State Bd. of Education*, 811 F.2d 1030 (7th Cir. 1987). Despite this well-established precedent, there exists no evidence that Congress ever considered undoing these recognized and accepted judicial standards in enacting NCLB.

1. Congress Never Considered the Private Right of Action Under the EEOA

Petitioners do not argue that Congress ever debated the merits or the history of the EEOA's private right of action when enacting NCLB. Instead, Petitioners rely on the converse: that by never mentioning the EEOA or "appropriate action," Congress must have intended to allow states to satisfy their obligations under the EEOA by meeting the requirements outlined in NCLB. This argument turns statutory construction canons on their head and finds no support in the cases cited by Petitioners.

This Court has refused to draw inferences about Congress' intent to repeal preceding statutes when Congress fails even to mention the purported change in the legislative history of the successive statute. *See, e.g., American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613-14 (1991) ("If this amendment had been

intended to place the important limitation on the scope of the Board's rulemaking powers that petitioner suggests, we would expect to find some expression of that intent in the legislative history.") (citing *Harrison v. PPG Indus.*, 446 U.S. 578, 602 (1980) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.")) As in the cases cited above, Petitioners reference no legislative history of NCLB indicating Congress' intention to sweep away the EEOA's private right of action against states.

2. The Courts Have Developed a Working Definition of "Appropriate Action" That Fulfills the Purpose of the EEOA

Petitioners also wrongly assert that the Court should substitute the remedial scheme in NCLB for the obligations of states under the EEOA because the term "appropriate action" is ambiguous and therefore must be interpreted under the NCLB statute. NCLB and ESEA are not the same or even "successive" statutes amending the ESEA.[9] In fact, the ESEA

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[9] The EEOA is Title II to the Education Amendments of 1974 but it did not amend the Elementary and Secondary Education Act of 1965. Title I of the ESEA is specifically named "Amendments to the Elementary and Secondary Education Act

(Continued on following page)

existed both before and after the EEOA, the statutes were codified under different chapters, and both have existed harmoniously for 35 years. Furthermore, Petitioners' interpretation defeats Congress' purpose for the EEOA, which is to require states and education agencies to take "appropriate action" in addressing the needs of ELL students and to provide an avenue for judicial redress. As this Court has stated, courts must interpret statutes in a manner that fulfills the intent of Congress. *Fitzgerald*, 129 S. Ct. at 788. The lower courts have assumed this task and developed a working definition of "appropriate action."

In *Castaneda v. Pickard*, the Fifth Circuit developed a three-prong test in order to decide whether an education agency has taken "appropriate action" under the EEOA. 648 F.2d 989, 1009 (5th Cir. 1981). The Fifth Circuit required: that ELL programs be based on sound pedagogical theory; that the theory be supported with the appropriate practices, personnel and resources; and that the programs be successful in actually helping students to overcome their language barriers. *Id.* at 1009-1010. This test has been adopted consistently by appellate courts across the country. *See, e.g., Gomez*, 811 F.2d 1030; *Idaho Migrant Council v. Bd. of Education*, 647 F.2d 69 (9th Cir. 1981).

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of 1965." Thus, the EEOA is not an amendment to ESEA but falls under the "other purposes" language of the Act's stated purpose. Pub. L. No. 93-380, 88 Stat. 515 (1974).

This existing body of law defining "appropriate action" never once caused Congress to consider amending NCLB to address the courts' interpretation of "appropriate action." This further evidences Congress' intent to have the EEOA and NCLB co-exist and the remedy under the EEOA to be unaffected. *See Fitzgerald*, 129 S. Ct. at 797 (in failing to find congressional intent in Title IX to repeal § 1983 claims, the Court emphasized the importance of the state of the law interpreting § 1983 claims when Title IX was enacted).

B. NCLB and the EEOA Work in Harmony

Because the EEOA and NCLB operate in tandem to meet the needs of ELL students, there is no basis on which to conclude that the latter statute supplants the obligations of the former. *See United States v. Estate of Romani*, 523 U.S. 517 (1998) ("we think the proper inquiry is how best to harmonize the impact of the two statutes"). Although two statutes may have the same overall goal, their different roles in achieving that goal remain relevant in determining whether one statute overrides another. *See Erlenbaugh v. United States*, 409 U.S. 239 (1972) (finding that an exception under one anti-gambling statute did not apply to another anti-gambling statute because the two laws served different roles although both were aimed at stopping organized crime).

The EEOA and NCLB share part of the same goal in enabling ELL students to become proficient in

English, and although their functions are different, they complement one another rather than conflict. As stated above, the EEOA is a federal civil rights statute that allows individual ELL students to sue when their state has denied them equal educational opportunities. *See* Statutory Background, *supra*. Conversely, NCLB is a federal funding statute that potentially allows the federal government to withhold funds from voluntarily participating states when they fail to adhere to specific program requirements. *See id*. However, these differences show that the statutes are complementary rather than in conflict.[10]

C. Congress Never Intended to Repeal or Otherwise Preclude Actions Under the EEOA for Individuals Against States

Petitioners attempt to side-step this Court's unwillingness to repeal congressional statutes by judicial fiat, stating that they do not seek a repeal of

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[10] This is further evidenced by the supplement-not-supplant provision of Title III. The Department of Education has interpreted the supplement-not-supplant section as drawing a distinction between funds from NCLB and funds which the state must raise to comply with the EEOA. U.S. Dep't of Education, *Supplement Not Supplant Provision of Title III of the ESEA*, *available at* http://ed.gov/programs/sfgp/supplefinalattach1.doc ("This requirement is . . . based on the . . . [EEOA] . . . Therefore, the use [of] . . . Title III funds to provide core language instruction educational programs . . . would violate the supplement not supplant provision . . . as such services are required to be provided by States and districts regardless of the availability of Federal Title III funds.").

the EEOA, only that they should not be held to the EEOA's standard of "appropriate action" in light of NCLB's specific requirements pertaining to the education of ELL students.[11] However, Petitioners' citation to *United States v. Fausto*, 484 U.S. 439, 452 (1988), for their theory that "the implications of a statute may be altered by the implications of a later statute" is unavailing here. (*See* Superintendent's Br. at 60). Unlike the judicially-created implied action in *Fausto*, the EEOA has an express cause of action; consequently, there is no "judicial interpretation" to repeal.

In *Fausto*, the Court found that Congress created the Civil Service Reform Act "to replace the haphazard arrangements for administrative and judicial review of personnel action, part of the 'outdated patchwork of statutes and rules built up over almost a century.'" *Id.* at 444. The Court also noted the widespread abuse of the administrative and judicial review processes by civil service employees. *Id.* at 445. As a result, the Court found that although there was not an express repeal of the Back Pay Act by Congress in the CSRA, the Court repealed its own judicial interpretation of an implied claim under the

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[11] Oddly enough, Petitioners further proffer that ELL students could maintain an action against a district or school (not the state) but never explain how Congress intended such varying results. Of course, if the problem is systemic and begins at the state level, such an interpretation would provide no meaningful protection of the civil rights of ELL children.

Back Pay Act for certain civil servants. *Id.* at 453. Here, the legislative history of NCLB provides no indication that its purpose was to address a haphazard arrangement or widespread abuse of administrative and judicial review processes under the EEOA nor was there an implied right of action created by the courts. As stated earlier, Congress made no mention of the EEOA.

The lone mention of the EEOA was indirectly through the NCLB's savings clause, which represented Congress' intent to *preserve* civil rights protections under the EEOA. Similar savings clauses in statutes have been recognized as evidence of Congress' intent to preserve actions in other statutes. *See Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983) (holding that the savings clauses in the 1933 Securities Act and the 1934 Securities Exchange Act confirmed that the remedies in each Act were to be supplemented by "any and all" additional remedies); *see also Pennsylvania R.R. v. Sonman Coal Co.*, 242 U.S. 120, 123-124 (1916) (holding that, "a manifest purpose of [a savings clause] is to make it plain that such appropriate common law and statutory remedies as can be enforced consistently with the scheme and purpose of the act are not abrogated or replaced") (internal quotation omitted).

Adopting Petitioners' argument here could lead to countless similar preclusion defenses to other civil rights lawsuits filed to protect the rights of students to equal educational opportunities, including special education and minority students who are "covered"

under the NCLB. To the contrary, the Court has consistently found that civil rights statutes touching upon the same or similar subject can co-exist. *Fitzgerald*, 129 S. Ct. at 788 (unanimous opinion holding that Title IX does not preclude § 1983 actions alleging unconstitutional gender discrimination); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 383 (1983).

II. Petitioners Overstate the Operation and Remedial Scheme of NCLB

Petitioners acknowledge that Section 1703(f) of the EEOA remains a viable, individual rights securing statute, although they maintain that the thrust of the statute does not reach to Arizona's school funding plans.[12] Nonetheless, they also argue that the application of Section 1703(f) rests on one question: Whether Arizona receives federal funding under the NCLB. That question grossly overstates the operation of NCLB itself. Although NCLB has a number of complex provisions and seeks to hold states accountable for the expenditure of federal funds, it is not the all-encompassing, comprehensive remedial scheme meant

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[12] Petitioner Horne: "The Superintendent never claimed that NCLB negated the EEOA." Superintendent's Br. 59. Petitioner Speaker of the House: "Moreover, situations may well arise where, although a State is in compliance with NCLB's mandates, particular schools or school districts engage in individual instances of discrimination for which a court-ordered remedy under the EEOA is 'essential' to correct a 'particular denial [ ] of equal educational opportunity.'" Legislators' Br. 60.

to replace the EEOA as described by Petitioners. As indicated further below, NCLB's coverage is quite limited and inconsistent. Congress could not have intended that NCLB would repeal the ability to bring EEOA actions against states under a system where hundreds of thousands of ELL students nationally are simply not counted for NCLB's purposes.

A. NCLB is Subject to Re-authorization

As pointed out above, courts have sensibly interpreted Section 1703(f) for 35 years. During that time there have been numerous iterations of the ESEA, including the changes to the Act's provisions that pertain to ELL students. While some courts, including the court of appeals in the seminal *Castaneda* case, have consulted those provisions to determine the scope of Section 1703(f), no court has stated that it could not weigh evidence of whether language programs of any nature were being implemented by trained teachers with access to materials for ELL students under the monitoring authority of the state and local education agencies ("LEAs"). In now urging that judicial inquiry end with "NCLB compliance," Petitioners confront an initial dilemma. Congressional authorization for funding NCLB has expired.[13] How and whether the Act will be extended is

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[13] The Act was funded for the Fiscal Year 2002 through Fiscal Year 2007. The funding was automatically extended through September 30, 2008, pursuant to 20 U.S.C. § 1226(a).

not known.[14] Yet Petitioners urge that § 1703(f) be conflated with NCLB even in the face of NCLB's uncertain future. This Court should summarily reject Petitioners' argument.

B. Petitioners Concede Various Aspects of "Appropriate Action" Under the EEOA Were Neither Required by NCLB Nor Approved by the USDOE

Petitioners implicitly acknowledge that the "appropriate action" requirement of Section 1703(f) requires states to do more than comply with NCLB. For example, Superintendent Horne states: "In this case, 'appropriate action' has been taken by improving ELL programming, hiring ELL qualified teachers, and reducing class sizes." (Superintendent's Br. 4). These examples of "appropriate action" taken by Arizona are not challenged by *amici*. Although they are not inconsistent with the goals of NCLB, it is

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[14] The Court can take note that the future is, at least, unknown. One of the original authors of NCLB has noted: "In the five years since its passage, however, NCLB has produced both strong support and vociferous criticism . . . Some have even called for the act's repeal." Sen. Edward M. Kennedy, *Foreword*, Winter 2006 Issue, Harv. Educ. Rev. (2006), *available at* http://www.hepg.org/document/9/; Goldwater Institute, *Opting Out of No Child Left Behind* (2008); The Heritage Foundation, *Reforming No Child Left Behind by Allowing States to Opt Out: An A-Plus for Federalism* (2007); Arizona Republic, *An uncertain future for 'No Child Left Behind'* (2009), *available at* http://www.azcentral.com/arizonarepublic/local/articles/2009/01/25/20090125ednochild01.

instructive that these "appropriate actions" are not required by NCLB, which does not speak to monitoring, reducing class size or ELL teacher endorsements.[15]

C. In Contrast to the EEOA, NCLB Does not Address Equal Opportunity for All Parts of an Educational Program

Despite ambitious language about closing the academic achievement gap (*see* 20 U.S.C. § 6812(1)), NCLB only holds schools accountable for improving math and ELA. *See* 20 U.S.C. § 6311(b)(2)-(3).[16] By contrast, the EEOA mandates that states ensure that ELL students are provided with equal access to all "instructional programs" offered by an LEA (20 U.S.C. § 1703(f)), which by definition encompass

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[15] The Superintendent's statement that: "Many of these steps were approved by the federal government and none of them existed before 2000" should not be taken to infer that these actions by Arizona were required by NCLB. In fact, a close examination of the nine transcript citations that accompany the statement reveals that few are examples of the federal government approving Arizona's measures. Superintendent's Br. 18 referencing Tr. Day 1, pp. 36, 43, 45, 47, 50, 55, 65, 70, 158.

[16] The Act also requires testing in science beginning in 2007-08 (20 U.S.C. § 6311(b)(3)(C)(v)(II)), but states, districts, and schools are not held accountable for students' progress in science as no specific "Annual Measurable Objective[s]" need be set as with English and math. (20 U.S.C. § 6311(b)(1)(G); 34 C.F.R. § 200.20).

many subjects and programs beyond math and English.

NCLB's definition of "core academic subjects," while not exhaustive, illustrates the type of "instructional program" to which ELL students are entitled, defining "core academic subjects" as English, reading/language arts, math, science, foreign languages, civics and government, economics, arts, history, and geography. 20 U.S.C. § 7801(11); 34 C.F.R. § 200.55(c). Where an LEA offers these "core academic subjects" within its "instructional programs," under the EEOA, it must also provide ELL students with equal access to this academic content. *See Castaneda*, 648 F.2d at 1011 (§ 1703(f) requires schools to "design programs which are reasonably calculated to enable [LEP] students to attain parity of participation"). Under NCLB, with its focus on English and math, a state or LEA may meet its NCLB goals for ELL students under Title I (AYP) and Title III (Annual Measurable Achievement Objectives, "AMAOs") and yet provide ELL students little or no instruction in other subjects.

D. The Accountability Provisions of NCLB Exclude Thousands of ELL Students

Central to NCLB's accountability provisions is the concept of AYP as determined by assessments of students, including ELL students. *See* 20 U.S.C. § 6311. A school that fails to make AYP for two consecutive years is identified as needing "school improvement"

under 20 U.S.C. § 6316. Although parents of students in such schools are provided with the option of transferring their students to another school in the district (*id.* at § 6316(b)(1)(E)(i)) and may select supplemental educational services if an identified school continues to lag after one year (*id.* at § 6316(b)(5)), insofar as Title III of NCLB is concerned, those options are not available to parents of ELL students where annual progress in learning English is not occurring but only to parents at those schools that do not meet AYP.[17] Since NCLB does not incorporate a private right of action,[18] these limited parental options of transferring to another school or possibly receiving supplemental services become the only way that some but not all parents of ELL students can attempt to mitigate the harm to their children of unequal education.

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[17] The requirement that ELL students show progress toward learning English is different than that of the requirement to meet AYP in English/Language Arts. The first is measured by English language growth on a language proficiency test for ELL students. AYP in English is the requirement for meeting a state's proficiency standards in English/Language Arts that is required of all students, ELLs and non-ELLs alike. 20 U.S.C. §§ 6311(b)(2)(B), 6311(b)(7) & 6842(a)(3)(A). Additionally, not all approved supplemental service providers are required to be able to provide services to ELL students. *See* U.S. Dep't of Education, *Non-Regulatory Guidance, Supplemental Educational Services* 19-20 (2009), *available at* http://www.ed.gov/policy/elsec/guid/suppsvcsguid.pdf.

[18] Legislators' Br. 15.

1. NCLB's Provisions Exclude Large Numbers of ELL Students due to Grade Exclusion

NCLB's accountability provisions are focused on grades 3-8 and grades 10-12 – grades K, 1, 2, and 9 are not specifically considered.[19] For the 2007-2008 school year in Arizona, 88,524 ELL students were not considered because they are not within the grades specified for assessment under the NCLB. Collectively, these four grades accounted for approximately 50% of Arizona's ELL student population[20] and are not counted when it comes to the aforementioned parental options-generating provisions of NCLB.

In California, which educates almost one-third of all ELL students in the nation, students are tested for NCLB purposes in grades 2-8, and then again in grade 10.[21] In 2008, there were 584,977 ELL students in grades K, 1, 9, 11, and 12 in California left entirely

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[19] Under 20 U.S.C. § 6311, the test scores of students at grades 3-8 and (at least once) in grades 10-12 are counted to determine whether schools will be identified for improvement – the precondition for the triggering of the two parental options of student transfer and supplemental services.

[20] Arizona Department of Education, Personal Communication to Roger Rice, Re: 00-ADE Data Request (Feb. 2, 2009).

[21] California Dep't of Educ., *2008 Adequate Yearly Progress Report Information Guide*, 7 (Nov. 2008), *available at* http://www.cde.ca.gov/ta/ac/ay/documents/infoguide08r.pdf.

outside NCLB's accountability framework due to grade exclusion.[22]

The fact that most high schools do not receive Title I funds at all underscores NCLB's limitations in reaching all students for accountability purposes. Title I funds are used predominantly at the elementary level. In 2004-05, for example, 71 percent of elementary schools received Title I allocations, compared with 40 percent of middle schools and 27 percent of high schools. Students in grades 10 through 12 accounted for 21 percent of all public school students but constitute only 9 percent of Title I participants.[23] As a result, NCLB's "system" fails to address the progress of thousands of secondary students – including those who are in greatest danger of dropping out of school.[24]

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[22] Warren Institute, *Analysis of 2008 NCLB Accountability for ELL Students in California*, Table 5, *available at* http://www.law.berkeley.edu/3164.htm.

[23] U.S. Dep't of Education, *National Assessment of Title I Final Report*, xxi, 13 (2007). The accountability provisions of NCLB apply only to schools and districts that receive Title I funds. *See* 20 U.S.C. § 6311(b)(2)(A)(ii), limiting the requirements of § 6316 (which sets out the parental rights to transfer students and also to seek supplementary services) to Title I schools.

[24] According to the Arizona Department of Education, *Research and Evaluation Section* (Oct. 2008), the statewide dropout rate more than doubles between grade 8 and grade 9. A study of national data by researchers at Boston College found that: "the rate at which students disappear between grades 9

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2. When There are Fewer Than 40 Students in the ELL Group, Arizona ELL Students Are Excluded for Accountability Purposes

Under NCLB, student subgroups such as ELL students are not counted in AYP calculations when their number is too small. 20 U.S.C. § 6311(b)(2)(C)(v)(II). For instance, Arizona's specific minimum number, or "N" size, is 40 students[25] in any one subgroup (including ELLs), which was an increase from Arizona's prior "N" of 30.[26]

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and 10 has *tripled* over the last 30 years." Walt Haney et al., *The Education Pipeline in the United States, 1970-2000*, 10 (2004).

[25] *State of Arizona Consolidated State Application Accountability Workbook*, 45 (Revised July 3, 2008, Final Submission).

[26] Thirty students was conventionally considered large enough to provide statistically meaningful results, but Arizona received permission from the Department of Education to raise the minimum number to 40. Arizona Department of Education, *Arizona's School Accountability System Technical Manual*, Vol. II, 19 (2004) *available at* http://azed.gov/azlearns/NCLB_Technical_Manual_2003.pdf; *Decision Letter on Request to Amend Arizona Accountability Plan*, Letter, Henry L. Johnson to Tom Horne (Sept. 15, 2005), *available at* http://www.ed.gov/print/admins/lead/account/letters/acaz3.html. The Commission of No Child Left Behind, a bipartisan group charged with providing recommendations to improve NCLB, suggests "N" sizes of no larger than 20 students to ensure accountability for all students. Commission on No Child Left Behind, *Beyond NCLB: Fulfilling the Promise to Our Nation's Children* (Washington, D.C.: The Aspen Institute, 2007). *See also* Erin Dillon & Andrew J. Rotherham, *State's Evidence: What It Means to Make 'Adequate Yearly Progress' Under NCLB*, Education Sector (2007).

The test scores of students below a minimum group size in a given LEA are not evaluated or reported as a separate subgroup, but rather are grouped with all student scores in the LEA and therefore may be masked by the achievement of other students. As a result, only those schools or school districts with the largest ELL student populations are held accountable for their academic achievement under NCLB.[27]

As another example, California includes ELLs as a subgroup in its calculations only if there are 100 or more ELLs enrolled at the school or there are 50 or more ELLs and they make up at least 15 percent of the tested population.[28] Thus, there were nearly 95,000 ELLs in schools in California which did not need to satisfy AYP for ELLs because the ELL population was deemed not numerically significant.[29]

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[27] For example, a school with an "N" size of 30 "where 50 percent of the students in grades K-6 are [ELL] can nonetheless avoid having to have a [ELL] subgroup if there are only 29 [ELL] students in grades 3-6." Wayne E. Wright, Education Policy Study Laboratory, Language Policy Research Unit (LPRU), *Evolution of Federal Policy and Implications of No Child Left Behind for Language Minority Students* (Arizona State University) 42-43 (January 2005), *available at* http://epicpolicy.org/files/EPSL-0501-101-LPRU.pdf.

[28] Letter from U.S. Dep't of Educ. to California (Jan. 8, 2009), *available at* http://www.ed.gov/admins/lead/account/cornerstones/ca.pdf.

[29] Warren Institute, *Analysis of 2008 NCLB Accountability for ELL Students in California*, Table 3, *available at* http://www.law.berkeley.edu/3164.htm.

When ELLs in grades not counted for accountability are combined with those excluded due to lack of numerical significance, these two gaps in NCLB's accountability system left 679,521 ELLs in California – nearly half of all ELLs in the state, or one-sixth of all ELLs in the nation – beyond the reach of NCLB accountability mechanisms for ELLs. Even in the subset of California districts meeting NCLB accountability requirements with ELLs, there were 125,508 ELLs not covered by any ELL accountability mechanism by virtue either of grade exclusion or not meeting the state's numerical significance standard for subgroup accountability.[30]

This data demonstrates there are ELL students who attend schools or are in school districts in California that may have met AYP, but who, as a subgroup, may not be proficient under state standards and who may not be receiving appropriate language instruction.

In its Notice of Proposed Rulemaking issued in April 2008, the U.S. Department of Education stated that nearly 2 million students are not being counted in NCLB subgroup accountability determinations at the school level. Minority students are as much as seven times more likely than white students to have their scores excluded from school-level AYP subgroup calculations. 73 Fed. Reg. 22020, 22022 (Apr. 23, 2008).

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[30] *Id.*, Tables 1, 3, 5.

3. Arizona's Application of a 99% Confidence Level Further Excludes ELL Students for Accountability Purposes

In addition to the minimum group size, states use confidence intervals in calculating AYP. This plus or minus zone or "window" gives schools and school districts leeway in the number of students that need to be proficient to meet AYP for a given year. According to the Congressional Research Service ("CRS"):

> Use of this technique (also) tends to have the effect, whether intentional or not, of substantially reducing the number of schools or ELLs identified as failing to meet AYP standards. Use of this statistical technique is not explicitly authorized by the NCLB, but its inclusion in the accountability plans of several states has been approved by ED.[31]

Under this procedure, the higher the confidence interval the larger the zone must be and the fewer students will need to score proficient to meet the AMAOs or AYP.[32] In Arizona, AYP determinations are

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[31] Wayne C. Riddle, *CRS Report for Congress, Education for the Disadvantaged: Reauthorization Issues for ESEA Title I-A Under the No Child Left Behind Act*, 19 (2006).

[32] The Commission on No Child Left Behind recommends limiting confidence intervals to 95%. Commission on No Child Left Behind, *Beyond NCLB: Fulfilling the Promise to Our Nation's Children* (Washington, D.C.: The Aspen Institute, 2007). *Also see*, Erin Dillon and Andrew J. Rotherham, *States'*

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based on a 99% confidence level and the Arizona Department of Education determines the confidence interval for the percent proficient for each subject and grade.[33]

Utah, like Arizona, uses a 99% confidence interval. In Utah, the proficiency objective for Language Arts for grades 3-8 is 65% proficient, and for mathematics at least 57% proficient. For a group of 25 students, the 99% confidence level would have the effect of reducing the required number of proficient students under AMAO for math from 15 (57% of 25) to 8 proficient students.[34] The same critique applies to Arizona and other states as well.

Evidence: What It Means to Make 'Adequate Yearly Progress' Under NCLB, Education Sector (July 2007).

[33] *See* Arizona Department of Education, *Arizona's School Accountability System 2006, Technical Manual, Volume II: Adequate Yearly Progress*, DE 12 (2007).

[34] David Rogosa, *Statistical Misunderstandings of the Properties of School Scores and School Accountability*, in *Yearbook of the National Society for the Study of Education*, Vol. 104, 165-6 (2005). *See also* David Rogosa, *The NCLB "99% confidence" scam: Utah-style calculations*, Stanford University (November 2003) *available at* http://www-stat.stanford.edu/~rag/nclb/utahNCLB.pdf.

4. The Meaning of "Making Adequate Yearly Progress" Does not Necessarily Equate to Success for all ELL Students

The number of ELL students' scores potentially considered for accountability purposes under 20 U.S.C. §§ 6311 and 6316 is considerably diminished (1) after grades K-2 and 9 are excluded, (2) by not counting the ELL subgroup members where there are fewer than 40 in a cohort, and (3) by application of the confidence interval procedure. The remaining pool of ELLs for determining AYP is then measured against the annual progress as set by the State.[35]

Arizona's Annual Proficiency Goals for School Years 2005-2007							
Grade	**3**	**4**	**5**	**6**	**7**	**8**	**High School**
Math	43.3%	54%	33.3%	43%	48%	22.5%	25%
Reading	53.3%	45%	43.3%	45%	49%	42.5%	35.8%

[35] Petitioner Horne is incorrect in stating that: "NCLB also sets certain minimum targets so that specified percentages of . . . ELL students must . . . achieve success academically (AYP) on Arizona's AIMS tests." (Superintendent's Br. 18). As the State's witness testified at trial, it is the Arizona Department of Education that sets improvement percentages for ELL students, not NCLB. *See* Tr. Day 1, p. 160. *See also,* Ellen Forte Fast & William J. Erpenback, *Revisiting Statewide Educational Accountability Under NCLB, Council of Chief State School Officers*, 21 (2004) ("The Act leaves it to states to determine the level of performance that reflects adequate preparation or proficiency.").

As the table above demonstrates, schools in Arizona meet their annual proficiency standards under NCLB even when approximately between 50 and 75% of their students are *not* proficient in math or Reading.[36]

The low rate of annual proficiency set forth by Arizona for those ELL students actually subject to NCLB's provisions is further watered down for accountability purposes through application of additional devices, thus further distancing NCLB from the purposes of the EEOA. Under 20 U.S.C. § 6311(b)(I), if a sub-group such as ELL students does not meet the State's academic achievement objectives in any year, their school will still be considered to have met its annual progress standard if the percentage of those proficient increased by 10% from the preceding year. So, for example, if only 20% of ELLs meet the proficiency standards in any given year, a school will still meet its AYP requirement if only 22% of ELLs meet academic proficiency in the following year, an increase of 10%.

Furthermore, school districts can only be determined to need "improvement" if they fail to make AYP in the same subject for two consecutive years in both elementary/middle school and high school.[37] If high

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[36] *State of Arizona Consolidated State Application Accountability Workbook*, 31 (July 3, 2008).

[37] *See, Decision Letter on Request to Amend Arizona Accountability Plan, supra* at n.26. As one commentator has described the practice: "A district could fail two-thirds of its

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school ELLs fail to master math, for example, there is no district failure so long as elementary school students meet the math AYP criterion. Similarly, if elementary school ELLs fail to meet the State's academic objectives in Reading in year one, meet the objective in Reading in year two, but fail to meet the math objective, annual progress will be considered to have been met because the failure was not in the same subject for two consecutive years.

5. Not all School Districts with ELL Students Participate in Title III Funded Programs

All school districts are expected to serve their ELL students, but not all districts are eligible for Title III funding. Under 20 U.S.C. § 6824(b), a State education agency shall not award a sub-grant to a school district in an amount less than $10,000. States have discretion in determining how to implement this provision. In Massachusetts, for example, Title III funds are distributed to school districts enrolling 100 or more ELL students. In FY2007, this meant that 56 out of 251 school districts with ELL students

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students every year and never be held accountable, as long as it wasn't exactly the *same* two-thirds." Kevin Carey, *The Pangloss Index: How States Game the No Child Left Behind Act*, 10 (Nov. 2007), *available at* http://www.educationsector.org/usr_doc/The_Pangloss_Index.pdf.

were eligible for Title III allocations.[38] In New York State for the 2006-2007 school year, 271 school districts were eligible for Title III funding for their ELL students but 628 school districts with ELL students were not directly eligible.[39]

E. Many ELLs Who are Failing to Demonstrate Proficiency on State Assessments are in Districts and Schools Satisfying all the Accountability Requirements of NCLB

There are hundreds of thousands of ELL students failing to meet their state-mandated proficiency rates in school districts that are meeting all of NCLB's ELL accountability requirements. A research study in California found that a majority of ELL students (140,243) who attend school in California's NCLB-compliant districts did not score "proficient" on the English/Language Arts assessment.

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[38] Mass. Dept. of Elementary and Secondary Education, *No Child Left Behind Title III: Language Instruction for Limited English Proficient & Immigrant Students Program*, *available at* http://www.doe.mass.edu/ell/titleIII.html (last visited Mar. 23, 2009).

[39] New York State Education Department, *No Child Left Behind Allocations for Title III, Part A For New York State Public School Districts and Charter Schools* 2006-2007 (Dec. 5, 2006), *available at* http://www.emsc.nysed.gov/funding/cladcep/0607/titleIIIallocs0607rev8-9-06.htm.

School-level data reveals even more starkly the differences between meeting accountability requirements under NCLB and learning academic English. In California, among schools that made AYP in 2008, there were 209,012 ELLs – approximately 1 in 8 ELLs in the state – who were not proficient in ELA (58%) and 164,748 (46%) not proficient in math.[40] *Amici* do not suggest that failing to achieve proficiency *per se* constitutes an EEOA violation when states and districts are otherwise taking appropriate action under the EEOA. Rather, as the data suggest, even ELLs in districts and schools meeting NCLB accountability properly retain the right to question whether their educational agencies are taking appropriate action as to them.

III. Petitioners' Interpretation of the EEOA Would Embroil the Court in Oversight of NCLB

The history of cases involving Section 1703(f) of the EEOA show that courts have been able to balance the requirement that states and local school districts take "appropriate action to overcome language barriers" with deference to the role of local government in educational policy setting. In urging that this standard now

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[40] Warren Institute, *Analysis of 2008 NCLB Accountability for ELL Students in California*, Tables 2, 4, *available at* http://www.law.berkeley.edu/3164.htm. Nearly 18% of ELLs in these "successful" schools were not counted as part of an ELL subgroup. *Id.*, Table 3.

be merged with NCLB, Petitioners are inviting an expansive new realm of judicial involvement in public education.

If the measure of "appropriate action" under the EEOA is to be gauged by whether a state or school district is "in compliance" with NCLB, inevitably the question will turn to how "compliance" is to be determined. That, in turn, raises the question whether the U.S. Department of Education's multiple interpretations and exceptions in the administration of NCLB are themselves "appropriate actions" faithful to the EEOA statute. Academic commentators who have carefully tracked how NCLB has been implemented have noted that: "what once seemed a clear if highly controversial policy has now become a set of bargains and treaties with various states."[41] Put another way, the facile notion of "compliance with NCLB" can mean different things in different states.

For example, Arizona has increased its "N" size and confidence intervals under NCLB, as well as loosened its definition of school districts requiring improvement, identifying only those districts when they did not make AYP in the same subject in both elementary/middle and high school grade spans for two consecutive years. The implications of these

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[41] Gail L. Sunderman, *The Unraveling of No Child Left Behind: How Negotiated Changes Transform The Law*, The Civil Rights Project, Harvard University 6 (February 2006). As a result "accountability no longer has a common meaning across states or even within states." *Id.* at 10.

changes are profound and, whatever their intent, serve to reduce the number of students counted and schools identifiable for "accountability" purposes.[42]

Amici are not taking a position as to whether these particular revisions and amendments are appropriate or consistent with Congress' intent or the language of NCLB. Rather, *amici* point them out to indicate that whatever surface appeal conflating the EEOA with NCLB may have, the path implies much more, rather than much less, judicial oversight.

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[42] *Decision Letter on Request to Amend Arizona Accountability Plan*, *supra* at n.26. *See* other Arizona letters requesting amendments in 2004, *available at* http://www.ed.gov/print/admins/lead/account/letters/acaz2.html, and http://www.ed.gov/print/admins/lead/account/letters/acaz4.html, (2006), http://www.ed.gov/print/admins/lead/account/letters/acaz5.html (2007), and http://www.ed.gov/print/admins/lead/account.letters/acaz6.html (2008).

CONCLUSION

For the above reasons, *amici* respectfully ask that the Court affirm the decision below.

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March 25, 2009

STATEMENT OF INTERESTS

The Earl Warren Institute on Race, Ethnicity & Diversity

The Earl Warren Institute on Race, Ethnicity & Diversity (Warren Institute) at the University of California, Berkeley is a national, multidisciplinary research, policy analysis and public education venture that engages challenging topics in civil rights, equal opportunity, race and ethnicity in America to provide valuable intellectual capital to public and private sector leaders, the media and the general public, while advancing scholarly understanding. Central to its methods are concerted efforts to build bridges connecting the world of research with the world of civic action and policy debate so that each informs the other, while preserving the independence, quality and credibility of the academic enterprise. The Warren Institute devotes significant attention to education issues, including promoting college-ready K-12 education for all, increasing access to quality education for immigrant children, improving system performance, and promoting institutional accountability for student success.

Education Law Center

Education Law Center (ELC) is a non-profit organization in Newark, New Jersey established in 1973 to advocate on behalf of public school children for access to an equal and quality education under state and federal laws. ELC represents the plaintiff school children in the *Abbott v. Burke* litigation and

continues to advocate on their behalf to ensure effective and timely implementation of the educational programs and reforms ordered by the New Jersey Supreme Court. Because of its nationwide expertise in school finance, preschool, facilities, and other areas of education law and policy, ELC established EducationJustice, a national program, to advance equitable educational opportunity and narrow achievement gaps. EducationJustice and ELC work to improve opportunities for low-income students, students learning English, and students with disabilities through policy initiatives, research, public education, and legal action, in states across the nation. EducationJustice has participated as *amicus curiae* in quality education cases in the state courts of Colorado, Connecticut, Indiana, Missouri, Oregon, and South Carolina.

LatinoJustice PRLDEF

LatinoJustice PRLDEF (formerly known as the Puerto Rican Legal Defense and Education Fund) was founded in New York City in 1972. Our continuing mission is to protect the civil rights of all Latinos and to promote justice for the pan-Latino community. Since our founding 36 years ago, we have become a major national civil rights organization litigating impact cases, primarily across the Eastern United States. In our first lawsuit, *Aspira v. New York City Board of Education*, we helped establish bilingual education in New York. We have combated the forced segregation of Latino children in Delaware, Connecticut and Massachusetts. In addition to creating pathways

for success for Spanish-speaking children in public schools, we have fought discriminatory hiring policies for civil service jobs, provided equal access to public housing for Latinos, secured the provision of public services in Spanish, and protected the constitutional rights of migrant workers. LatinoJustice PRLDEF has argued landmark civil rights cases that have had profound implications for all Latinos.

Mexican American Legal Defense and Educational Fund (MALDEF)

MALDEF is a national nonprofit organization established in 1968 to protect the civil rights of Latinos living in the United States. MALDEF secures the civil rights of Latinos through litigation, advocacy and education. MALDEF has represented Latino interests in many important language rights and other educational rights cases in Texas, California, Colorado, New Mexico, Arizona and other states, including the landmark case, *Plyler v. Doe*. MALDEF's mission includes a commitment to pursuing equal educational opportunities for Latino students, including the opportunity to become academically proficient in English and participate in parity with other students in educational programs, and therefore MALDEF has a strong interest in the outcome of this case.

Multicultural Education, Training & Advocacy, (META) Inc.,

Multicultural Education, Training & Advocacy, (META) Inc., is a national nonprofit organization formed in 1983 for the exclusive purpose of protecting the rights of language minority and poor children to equal educational opportunities in schools across the nation. META has pursued litigation, policy analysis, and community education, on behalf of such children in Massachusetts, New York, Florida, Texas, Colorado, California, New Mexico, and elsewhere. META knows firsthand what it means for these vulnerable student populations to go without appropriate education including the lack of trained teachers, curricula, and materials that are part of appropriate or equal education for any child. META is filing this brief because of the dangerous arguments advanced by Petitioners' case that seek to undo decades of sensible civil rights litigation in favor of reliance on an overstated and misunderstood federal funding statute that in no way allows the parents of English language learner students to protect their children's rights or future.

Public Advocates, Inc.

Public Advocates, Inc. is a non-profit, public interest law firm and one of the oldest public interest law firms in the nation. Public Advocates uses diverse litigation and non-litigative strategies to handle exclusively policy and impact cases that challenge the

persistent, underlying causes and effects of poverty and discrimination. Since its founding in 1971, a major focus of Public Advocates' work has been advocacy to advance equal educational opportunities for low-income students, students of color, and English Learners. Public Advocates was one of the lead counsel in *Williams v. State of California*, a statewide class action lawsuit challenging the state's failure to provide all students with basic educational resources: qualified teachers, textbooks, and decent school facilities. The *Williams* Settlement established, *inter alia*, robust systems for monitoring and enforcing EL students' rights to qualified teachers with specialized training in how to teach them and adequate instructional materials.

AMICUS CURIAE BRIEF

121

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Nos. 08-289 and 08-294 (Consolidated)

IN THE

Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, *ET AL.*,

Petitioners,

v.

MIRIAM FLORES, *ET AL.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

In 2000, a federal district court held that Arizona violated the Equal Educational Opportunity Act ("EEOA") because it was not adequately funding programs for teaching English to students. Since then, Arizona has implemented enormous funding increases and complied with the comprehensive federal requirements for English-language instruction under the No Child Left Behind Act ("NCLB"). The district court has nonetheless refused to modify its eight-year-old injunction, imposing multi-million dollar penalties on the State until the Arizona Legislature further (and substantially) increases funding. Applying a standard that conflicts with decisions of this Court and the other courts of appeals, the Ninth Circuit affirmed, holding that Petitioners were not entitled to relief because (i) the named defendants support the injunction, and (ii) the injunction's "basic premises" have not been "swept away."

The questions presented by these two consolidated cases are:

1. Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction (No. 08-294)?

2. Whether compliance with NCLB's extensive requirements for English language instruction is sufficient to satisfy the EEOA's mandate that States take "appropriate action" to overcome language

barriers impeding students' access to equal educational opportunities (No. 08-294)?

3. By mandating that the State of Arizona provide for a minimum amount of earmarked funding specifically allocated for English Language Learner programs statewide to comply with the "appropriate action" requirement of EEOA §1703(f), did the Ninth Circuit violate the doctrine prohibiting federal courts from usurping the discretionary power of state legislatures to determine how to appropriately manage and fund their public education systems (No. 08-289)?

4. Should the phrase "appropriate action" as used in EEOA §1703(f) be interpreted consistently with NCLB, where both Acts have the same purpose with respect to English Language Learners and the NCLB provides specific standards for the implementation of adequate English Language Learner programs, but the EEOA does not (No. 08-289)?

Questions 2 and 4 cover the same interplay between EEOA and NCLB, and Eagle Forum ELDF answers them together in Section IV. Questions 1 and 3 cover related issues of federalism in litigation of this type, and Eagle Forum ELDF answers them in Sections II and III, respectively. At the outset, Eagle Forum ELDF addresses the damage that bilingual education inflicts on its intended beneficiaries and the nation as a whole.

TABLE OF CONTENTS

Pages

Questions Presented i
Table of Contents iii
Table of Authorities iv
Interest of *Amicus Curiae* 1
Factual Background 2
Statutory Background 3
Summary of Argument 5
Argument 6
I. Bilingual Education Divides the Nation and Injures Students 6
A. Bilingual Education Balkanizes Our Nation 7
B. Bilingual Education Disenfranchises the Students Subjected to It 13
C. Courts Lack Authority to Require Education in Languages Other than English 18
II. Courts Must Alter Institutional-Reform Injunctions Unsupported by Current Facts and Law 20
III. The Lower Courts Usurped the State and Local Governments' Roles of Determining How to Manage and Fund Public Education 22
IV. Courts Must Read EEOA's "Appropriate Action" Consistently with Other Federal Legislation ... 24
A. Without Governing Principles, EEOA's Appropriate Action Is Non-Justiciable 25
B. NCLB Provides Governing Principles 29
C. Pre-NCLB Laws Provided Governing Principles 31
Conclusion 35

TABLE OF AUTHORITIES

Pages

Cases

Alexander v. Sandoval, 532 U.S. 275 (2001) 2

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Board of Educ. of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991) 21

Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981) 28

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Heckler v. Chaney, 470 U.S. 821 (1985) 27

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Lau v. Nichols, 414 U.S. 563 (1974) 8
Luther v. Borden, 48 U.S. 1 (1849) 26
Missouri v. Jenkins, 515 U.S. 70 (1995) 23
Morton v. Mancari, 417 U.S. 535 (1974) 30, 32, 35
Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55 (2004) 28
Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986) 31-32
Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 (1958) 27
People v. Superior Court, 92 P.R.R. 580 (1965) 9
Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) .. 29
Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992) 21
Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 25-26
U.S. v. Estate of Romani, 523 U.S. 517 (1998) 34
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U.S. v. Heirs of Boisdoré, 49 U.S. (8 How.) 113 (1849) 31
Vieth v. Jubelirer, 541 U.S. 267 (2004) 26

Statutes

Administrative Procedure Act, 5 U.S.C. §§551-706 27
5 U.S.C. §706(1) 28
8 U.S.C. §1423(a)(1) 12-13
8 U.S.C. §1423(b) 13
Equal Educational Opportunities Act, 20 U.S.C. §§1701-1721 ..... *passim*

20 U.S.C. §1703(f) ..... ii, 3, 26, 28, 31
20 U.S.C. §1706 4
20 U.S.C. §1712 ..... 4, 24, 28, 35
20 U.S.C. §6812(2) 4
20 U.S.C. §6845 29
20 U.S.C. §6845(2) 5, 29, 30, 35
20 U.S.C. §6847 ..... 5, 29
48 U.S.C. §864 7
Education Amendments of 1974 PUB. L. NO. 93-380, 88 Stat. 88 Stat. 484 (1984) 31
Bilingual Education Act, PUB. L. NO. 93-380, §105(a)(1), 88 Stat. 484, 503-12 (1984) 4, 31-34
Equal Educational Opportunities Act of 1974, PUB. L. NO. 93-380, §§201-259, 88 Stat. 484, 514-21 (1984) 3
PUB. L. NO. 98-511, §201, 98 Stat. 2366, 2369-87 (1984) 4
PUB. L. NO. 98-511, §201(a) , 98 Stat. 2366, 2370-71 (1984) 33
PUB. L. NO. 100-297, §1001, 102 Stat. 130, 274-93 (1988) 4
PUB. L. NO. 100-297, §7002(a), 102 Stat. 130, 275 (1988) 33
PUB. L. NO. 103-382, §7112, 108 Stat 3518, 3719-20 (1994) 33
No Child Left Behind Act of 2001, PUB. L. NO. 107-110, 115 Stat. 1425 (2002) ..... i-ii, 3-6, 24-35
English Language Acquisition, Language Enhancement, and Academic Achievement

Act, PUB. L. NO. 107-110, §301, 115 Stat. 1425, 1689-1734 (2002) 4, 29

Legislative History

118 CONG. REC. 8931 (1972) 2-3, 24

H.R. REP. NO. 98-748, *reprinted in* 1984 U.S.C.C.A.N. 4036 33

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Rules, Regulations and Orders

S. Ct. Rule 37.6 1

FED. R. CIV. P. 60(b)(5) 5, 20, 21

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and

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES, *ET AL.*,

Petitioners,

v.

MIRIAM FLORES, *ET AL.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum ELDF")[1] is a

[1] Eagle Forum ELDF files this *amicus* brief with the written consent of all parties; the written letters of consent from all petitioners and respondents have been lodged with the Clerk of the Court. Pursuant to this Court's Rule 37.6, counsel for

(Footnote cont'd on next page)

nonprofit organization founded in 1981 and headquartered in Saint Louis, Missouri. For more than twenty-five years it has defended American sovereignty and promoted adherence to the U.S. Constitution. Eagle Forum ELDF has repeatedly opposed unlawful behavior, including illegal entry into and residence in the United States, and encouraged State and local autonomy in the area of education. Eagle Forum ELDF has also long defended federalism, including the ability of state and local governments to protect their communities and maintain order. Eagle Forum ELDF's frequent participation as *amicus curiae* in appellate litigation involving immigration and English language issues, including *Alexander v. Sandoval,* 532 U.S. 275 (2001), in this Court, bears witness to its underlying interest in this Nation's immigration and education policies. For all of the foregoing reasons, Eagle Forum ELDF has a direct and vital interest in the issues presented before this Court.

FACTUAL BACKGROUND

Eagle Forum ELDF adopts the facts as stated by the petitioners. See Legislative Petitioners' Br. at 16-30; Superintendent's Br. at 2-30. In summary, after the district court found EEOA violations, the people

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(Footnote cont'd from previous page.)

amicus curiae authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, and its counsel make a monetary contribution to the preparation or submission of this brief.

of Arizona enacted Proposition 203 to require public instruction in English, with "English Language Learner" or "ELL" students educated in separate, structured immersion classes until they achieve English proficiency. In addition, Arizona and its local schools took efforts to comply with NCLB, enacted in 2002. At the Nogales schools that provided the basis for this litigation, in conjunction with adopting English immersion for ELLs and complying with NCLB, school officials improved the teaching staff, replaced ineffective teacher aides with higher-quality teachers, reduced class sizes, improved facilities, improved textbook supplies, and ended social promotion. In response to these efforts, the Nogales schools' scores improved to the point where no ongoing EEOA violation exists.

STATUTORY BACKGROUND

Congress enacted the Equal Educational Opportunities Act of 1974 as part of the Education Amendments of 1974. PUB. L. NO. 93-380, §§201-259, 88 Stat. 484, 514-21 (1984). Although motivated in large part by the Nixon Administration and Congress' desire to limit federal desegregation decrees that imposed busing as a remedy, 118 CONG. REC. 8931 (1972) (President Nixon's transmittal message to Congress), EEOA also addressed the denial of equal educational opportunity on account of race or national origin through "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." PUB. L. NO. 93-380, §204(f), 88 Stat. at 515 (codified at 20 U.S.C. §1703(f)). EEOA provides a

private right of action, 20 U.S.C. §1706, but limits the remedies available to those "***essential*** to correct particular denials of equal educational opportunity." 20 U.S.C. §1712 (emphasis added).

Enacted alongside EEOA in the Education Amendments of 1974 was the Bilingual Education Act, PUB. L. NO. 93-380, §105(a)(1), 88 Stat. 503-12, which reauthorized prior bilingual-education legislation. As explained in Section IV.C, *infra*, subsequent reauthorizations first opened the door to English immersion in 1984 with limited funding and then expanded that funding in 1988 in response to demands from the Nation's schools. PUB. L. NO. 98-511, §201, 98 Stat. 2366, 2369-87 (1984); PUB. L. NO. 100-297, §1001, 102 Stat. 130, 274-93 (1988).

Congress enacted NCLB in 2002, as part of an effort to enforce performance goals on schools. PUB. L. NO. 107-110, 115 Stat. 1425 (2002). With respect to bilingual education, NCLB's Title III, Part A – the English Language Acquisition, Language Enhancement, and Academic Achievement Act ("ELALEAAA") – re-codified the Bilingual Education Act, as amended and renamed. PUB. L. NO. 107-110, §301, 115 Stat. at 1689-1734. With respect to English education, ELALEAAA's purposes include "to assist all limited English proficient children, including immigrant children and youth, to achieve at high levels in the core academic subjects so that those children can meet the same challenging State academic content and student academic achievement standards as all children are expected to meet." 20 U.S.C. §6812(2). Finally, ELALEAAA's savings clauses provide *inter alia* that nothing in that

legislation either "require[s] a State or a local educational agency to establish, continue, or eliminate any particular type of instructional program for limited English proficient children," or "shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. §§6845(2), 6847.

SUMMARY OF ARGUMENT

Before addressing the questions presented by these consolidated cases, Eagle Forum ELDF respectfully submits that the urge to bestow bilingual services on language minorities disserves both the Nation and the minorities themselves (Section I). Against that background, this Court easily should find that – having satisfied EEOA with its English immersion program – Arizona is entitled to relief from the district court's injunction under Rule 60(b)(5), notwithstanding that Arizona did not implement the remedy that the district judge and Ninth Circuit might prefer (Section II). By exercising their political preferences over the law, the lower courts usurped State and local authority over education, well beyond both the expertise and the authority of the federal courts (Section III). Finally, while the petitioners are correct that NCLB compliance is *per se* EEOA compliance on English language instruction (Section IV.B), this Court should also consider that – in the absence of NCLB and other cabining federal legislation – EEOA's "appropriate action" requirement would be nonjusticiable and Arizona's compliance plans unreviewable (Section IV.A). Moreover, in addition to NCLB, prior federal statutory acceptance of English

immersion would support the appropriateness of Arizona's academic success, even if Congress had not enacted NCLB (Section IV.C).

ARGUMENT

I. BILINGUAL EDUCATION DIVIDES THE NATION AND INJURES STUDENTS

As Theodore Roosevelt famously observed:

> We must have but one flag. We must also have but one language. That must be the language of the Declaration of Independence, of Washington's Farewell address, of Lincoln's Gettysburg speech and second inaugural. We cannot tolerate any attempt to oppose or supplant the language and culture that has come down to us from the builders of this Republic.

THEODORE ROOSEVELT, *"The Children of the Crucible,"* 14 ANNALS OF AMERICA 1916-1928, 129, at 130 (1968).

When language divides, culture itself divides, and a division of political systems cannot be far behind. In many states, a mere referendum to amend the state constitution and split the government would suffice, once there is a sufficient division in language. Canada has suffered from and barely survived such division. A unified Nation the size of the United States depends on a common tongue. As Abraham Lincoln put it in his timeless speech to the Republican Illinois State Convention in 1858, "'[a] house divided against itself cannot stand.'" ROY A. BASLER, 2 COLLECTED WORKS OF ABRAHAM LINCOLN 461 (1953) (quoting *Matthew* 12:25). Although Lincoln was speaking about slavery, this eternal

principle holds true for language. The promotion of language balkanization leads to political separatism.

Federal courts do not allow language balkanization in their proceedings, not even in Spanish-speaking Puerto Rico: "All pleadings and proceedings in the United States District Court for the District of Puerto Rico shall be conducted in the English language." 48 U.S.C. §864. What works for federal court proceedings also makes the most sense for other governmental functions, including public schools, particularly where (as here) it enjoys local support. It is a colossal and costly mistake for a federal court to insist on language balkanization in the public schools against the will of the people.

Winston Churchill observed, "This gift of a common tongue is a priceless inheritance." Winston Churchill, Speech at Harvard University (Sept. 5, 1943). It is a gift for immigrants to the United States as much as to native-born Americans. English will remain the common language of the United States and American public schools are only harming students by perpetuating any inabilities to understand English. Just as all federal court proceedings in Spanish-speaking Puerto Rico are conducted in English, Arizona public schools have the right to take advantage of this "gift of a common tongue" and teach in English.

A. Bilingual Education Balkanizes Our Nation

Out of many, one: ***e pluribus unum***. For over two hundred years, America has been a country of one, including one common language. Many constitutional rights are built on the premise that

the public understands one common language. The right to a public trial requires that the public understand the language spoken at the trial. The right to petition the government assumes that the government and the public speak a common language. The right to see a warrant prior to allowing a search and seizure assumes that the recipient can understand the language of the agent presenting the warrant. The right to reasoned judicial decisions assumes that the decision is written in a language that the litigants understand.

The Constitution, including the Bill of Rights, was adopted on the assumption that there would be one language that is common to both the government and to the people. The Constitution implicitly disfavors language bifurcation that could frustrate constitutional rights to a public trial, petitioning of the government, warrants for searches and seizures, reasoned judicial opinions, and many other rights.

While English requirements have a disparate adverse impact on those who refuse to learn English, they have an enormously positive impact on those who meet the requirements and thus gain access to mainstream of American academic and economic life. *Lau v. Nichols*, 414 U.S. 563, 565 (1974) ("Teaching English to the students of Chinese ancestry who do not speak the language is one choice.").

Bilingual education, which often includes virtually no English, directly impedes the common language on which our great Nation has been built. Language division leads to political division and destructive internal conflicts. It is challenging enough to keep 300 million people "on the same

page" when they speak the same language; when they cannot even understand each other, that task becomes nearly impossible. The number of people living in the United States who cannot understand English is staggering. "Consider this: 40 million Americans will be non-English language proficient by the year 2000." 142 CONG. REC. H9741 (daily ed. Aug. 1, 1996) (statement by Rep. Goodlatte).

If 40 million non-English speakers broke off into regions of common language, then inevitably they would mandate use of their own language for legal proceedings and public business. The Puerto Rico Supreme Court, for example, denied an attempt by a litigant to use English in a local court proceeding, even though English was an official language along with Spanish. *People v. Superior Court*, 92 P.R.R. 580, 589-90 (1965) ("the means of expression of our people is Spanish, and ***that is a reality that cannot be changed by any law***") (emphasis added). There would be little reason for an enclave of foreign-speaking people not to have their own schools and governmental functions in their own language. Were this to become widespread, the United States would cease to be as "united" as it has been.

The cost of the disunity wrought by language balkanization is enormous, as demonstrated by the French-English divisions in Canada. It was only by a razor-slim 1.2% margin in 1995 that French-speaking Quebec residents failed in their referendum to secede from Canada, by a vote of 50.6% to 49.4%, and the outcome was contested for another decade until the ballots were shredded without ever being recounted. *Court ruling dashed hopes for an*

impartial recount; 1995 referendum ballots are history, THE GAZETTE (MONTREAL) A1 (July 16, 2008) ("The vote came under suspicion when several ridings in heavily federalist areas reported an abnormal number of ballots rejected for improper markings. Quebec Superior Court ruled in April [2008] that the documents could be destroyed."). A threat of re-emergence of language-based secession remains to this day. University of Ottawa history professor Michael Behiels was quoted on Dec. 4, 2008, that "[t]he secessionist movement has been ... just biding their time to watch to see if (Prime Minister Stephen) Harper would make a mistake. This is a very dangerous moment we're living through here." *Notes from Parliament Hill*, THE TORONTO STAR A23 (Dec. 4, 2008).

Portions of Quebec even voted to secede from Quebec had it seceded from Canada. "Several municipalities have held referendums asking their constituents whether, in case of Quebec's secession, they would want to stay within an independent Quebec or would prefer to remain within Canada through a partitionist process. They have usually obtained huge majorities in favor of the latter." Francois Crepeau, *The Law of Quebec's Secession*, 27 AMERICAN REVIEW OF CANADIAN STUDIES 27-50 (Sept. 1997). After all, "if a part of Canada (namely Quebec) can secede, then a part of Quebec can too." *Id.* Voters predictably want a government that speaks in their language, and bilingual education encourages the development of multiple governments:

> The [prior] conception [was] Canada is one country and only the Canadian people taken

> as a whole have a right to self-determination, to the exclusion of any of its alleged components: *au contraire*, if parts of the Canadian people may lay claim to self-determination, then other parts can too, including parts of the parts. (*Id.*)

Our own Nation, of course, also had a violent experience with secession nearly 150 years ago. But then there were powerful economic forces that bound the nation together, forces that are not as strong in the global economy of the 21st century. In Abraham Lincoln's annual address of 1862, he declared that the United States could not be broken up because it formed an indivisible economic unit, and that only its economic unity provided prosperity. GABOR S. BORITT, LINCOLN AND THE ECONOMICS OF THE AMERICAN DREAM 234 (1994). Lincoln observed that, even if the United States did disintegrate over slavery, economic incentives "would, ere long, force reunion, however much of blood and treasure the separation might have cost." BASLER, 3 COLLECTED WORKS OF ABRAHAM LINCOLN 17-18, 88, 120-21 (1953-55). Earlier, Lincoln had stated the economic case against secession as follows:

> On the side of the Union, it is a struggle for maintaining in the world, that form, and substance of government, whose leading object is, to elevate the condition of men – to lift artificial weights from all shoulders – to clear the path of laudable pursuit for all – to afford all, in unfettered start, and a fair chance, in the race for life.

BASLER, 4 COLLECTED WORKS OF ABRAHAM LINCOLN 438 (1953-55). Those economic forces that bound the Nation together in the 1860s, when there were substantial tariffs and no "off-shoring," are not as strong today.

No one today, except perhaps a veteran of the break-up of the Soviet Union, seriously predicts a break-up of the United States any time soon. Andrew Osborn, *As if Things Weren't Bad Enough, Russian Professor Predicts End of U.S.*, WALL STREET JOURNAL, A1 (Dec. 29, 2008) (Prof. Igor Panarin, dean of the Russian Foreign Ministry's academy for future diplomats, predicts U.S. dissolution into five or six pieces based in part on mass immigration and economic decline). But even those who consider U.S. disintegration unlikely nonetheless must regret the partial dissolution of the national fabric through increasing balkanization in multilingual government advertising and political campaigns. *Springs Senator Bashes Plan for Spanish Ads*, THE DENVER POST, B-02 (Jan. 27, 2009) ("All these ads are going to do is provide one more assimilation off-ramp for new arrivals"). Although the impulse to allow bilingual government may flow from a sense of openness, allowing balkanization inevitably closes communities off from each other, denying the current immigrants the shared experiences that past immigrants attained.

Rather than follow the path to balkanization, disintegration and dissolution with bilingualism, schools would be better advised to follow the example of the federal government itself, which conditions naturalization on English proficiency: "No person ...

shall hereafter be naturalized as a citizen of the United States upon his own application who cannot demonstrate ... an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language." 8 U.S.C. §1423(a)(1).[2] What is outrageous about this case is that Arizona has tried to follow the federal government's example, and a district court forbade it.

B. BILINGUAL EDUCATION DISENFRANCHISES THE STUDENTS SUBJECTED TO IT

The U.S. Constitution is written and implemented in English, and there is no official version in any other language. Our Rule of Law is based on more than 200 years of development of an enormous body of law in one language: English. Common law in the United States is built on 500 years of jurisprudence in one language: English. The Declaration of Independence, the Federalist Papers, Presidential speeches and Congressional debates, the U.S. Code, federal and Arizona judicial decisions, are all in English. It is impossible to translate this for bilingual education without altering its meanings. As the Spanish philosopher put it, "An idea does not pass from one language to another without change." MIGUEL DE UNAMUNO, THE TRAGIC SENSE OF LIFE,

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[2] Congress exempted certain persons over fifty years of age and with certain physical, developmental, or mental disabilities from the English-language requirement. 8 U.S.C. §1423(b).

AUTHOR'S PREFACE, xxxiii (J.E. Crawford Flitch transl. 1921).

The Constitution's vision is inseparable from its language. James Wilson, the only member of the Pennsylvania Ratifying Convention who had a seat at the Federal Convention, argued that English was linked to America' future greatness in his summation to the Pennsylvania Ratifying Convention:

> As we shall become a nation, I trust that we shall also form a national character; and that this character will be adapted to the principles and genius of our system of government, as yet we possess none – our language, manners, customs, habits, and dress, depend too much upon those of other countries. Every nation in these respects should possess originality, there are not on any part of the globe finer qualities, for forming a national character, than those possessed by the children of America... [In addition to a respectable national character,] I think there is strong reason to believe, that America may take the lead in literary improvements and national importance. This is a subject, which I confess, I have spent much pleasing time in considering. ***That language, sir, which shall become most generally known in the civilized world, will impart great importance over the nation that shall use it. The language of the United States will, in future times, be diffused over a greater extent of country, than any other that we now know.*** The

> French, indeed, have made laudable attempts toward establishing an [sic] universal language, but, beyond the boundaries of France, even the French language is not spoken by one in a thousand. Besides, the freedom of our country, the great improvements she has made and will make in the science of government, will induce the patriots and literati of every nation to read and understand our writings on that subject, and hence it is not improbable that she will take the lead in political knowledge.

James Wilson, Summation Address to the Pennsylvania Ratifying Convention (Dec. 11, 1787), *reprinted in* THE DEBATE ON THE CONSTITUTION – FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES, AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 865-66 (Gryphon Eds. 1993) (emphasis added). Now is not the time to reverse course.

Bilingual education of students in Arizona hurts their education. English is becoming "the lingua franca of the [21st] century" for the world, as admitted by Germany's leading newspaper: "After trying for decades to persuade more Britons to learn their language, the Germans have given up the struggle. Instead, they are promoting English as the language of the 21st century, with lessons for children as young as six." Toby Helm, *English is Language of Today, Germans Admit*, LONDON TELEGRAPH (Apr. 6, 2000) (quoting the *Frankfurther Allgemeine Zeitung*, interior quotations omitted). Switzerland has German, French, and Italian for its

official languages, but it also embraced English to be taught as the second language of choice, rather than its official languages. Fiona Fleck, *Swiss Want English as Second Language,* LONDON TELEGRAPH (Oct. 29, 2000).

English has some inherent advantages for technology, which ensure its future dominance as the most popular language. English has the smallest alphabet of major languages, including its lack of accented, hybrid, and pictograph characters. This facilitates efficient typing, the method for communicating over the internet, and allows use of the most basic character sets. English also features easy interchangeability of nouns, verbs, and adjectives, without much variance in form for pronouns and verbs. That promotes easy communication through brief, cryptic messages, the style preferred by electronic media. Students are hampered by not learning English.

English also features a powerful pipe-like quality, such that one phrase can be cut and pasted to another phrase with ease. Foreign phrases or terms can be inserted at will into English sentences, and the English language has grown enormously from its flexibility in incorporating words and phrases from other languages. Computer-based cutting and pasting text works more efficiently in English than in many other languages, such as those using pictorial characters. This is largely happenstance, but nevertheless gives English an advantage in the internet medium. Accordingly, English has exploded in worldwide popularity since the advent of the internet, and about 80% of the

internet uses English. English is now the second most widely spoken language in the world, with only Chinese dialect spoken by more people. English is overwhelmingly the second language of choice for non-English-speaking people. See Barbara Wallraff, *What Global Language?* 286 ATLANTIC MONTHLY No. 5, at 52 (Nov. 2000) (noting, *inter alia*, that "English is the working language of the Asian trade group ASEAN" and is also "the official language of the European Central Bank").

The entire world has been moving towards mandatory English. The New York City Bar Association recommended mandatory English for air travel, for example, citing this example:

> In 1993, Chinese pilots flying a U.S.-made MD-80 were attempting to land in northwest China. The pilots were baffled by an audio alarm from the plane's ground proximity warning system. A cockpit recorder picked up the pilot's last words: "What does 'pull up' mean?" What is needed, both in the U.S. and worldwide, is a mandatory spoken English test for pilots and controllers.

Aeronautics Committee of New York City's Bar Association Seeks to Raise the Bar on Safety, 12 AIR SAFETY WEEK, at 33 (Aug. 17, 1998). Although the lack of shared language has caused other airliner crashes,[3] the larger point is that this balkanization

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[3] The well-publicized crash of ValuJet Flight 592 in the Florida Everglades in 1996, killing all 110 on

(Footnote cont'd on next page)

inflicts similar disconnects countless times every day, across the range of human interactions, with incalculable – but avoidable – negative impacts.

C. COURTS LACK AUTHORITY TO REQUIRE EDUCATION IN LANGUAGES OTHER THAN ENGLISH

A federal court can no more require States to depart from English in official documents than it could draft an official Constitution or Declaration of

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(Footnote cont'd from previous page.)

board, was caused by mistakenly loading oxygen canisters as cargo. The investigation revealed that the canisters labeled as "repairable" had been misunderstood as "empty," and at one point the National Transportation Safety Board suggested that the use of non-English speaking mechanics may have been a problem. William Langewiesche, *The Lessons of ValuJet 592*, 281 ATLANTIC MONTHLY No. 3, 81 (Mar. 1998). With respect to the worst air disaster of all-time – the crash of a KLM 747-200 into a Pan Am 747-100 in Tenerife, Canary Islands in 1977 – the official report found that "inadequate language" was a cause. The KLM pilot used the phrase "we are now at take-off" when he meant to state that he was now taking off, and thereby proceeded to crash into another airplane on the runway and kill 583 persons on both planes. Report of the Secretary of Civil Aviation, Spain (Oct. 1978), *reprinted in* AIRCRAFT ACCIDENT DIGEST (ICAO Circular 153-AN/56, 22-68).

Independence translated into a different language. Our Nation was formed based on a one-language legal system, and States have full authority to adhere completely to that language in their official documents and in their public schools.

In contrast with other countries, the United States is governed by a written Rule of Law – defined and applied in English. Constitutional terms such as "due process of law," "high crimes and misdemeanors," and "common law" lack precise equivalents in other languages. Other constitutional law terms such as "freedom of speech," "cruel and unusual punishment," and "involuntary servitude" likewise lack identical counterparts in other languages. *See* Gregory Rabassa, No Two Snowflakes are Alike: Translation as Metaphor, at 1, *reprinted in* JOHN BIGUENET AND RAINER SCHULTE, THE CRAFT OF TRANSLATION 1 (1989) ("We should certainly not expect that a word in one language will find its equal in another"). Translation of the Constitution, or the enormous body of Supreme Court decisions construing it, into another language would create endless uncertainties and opportunities for alteration inherent in the translation process. *See, e.g.*, GEORGE STEINER, AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION 428 (3d ed. 1998) (noting the impossibility of perfect translation). Even a familiar phrase like "the American dream" encounters thorny problems of translation to other languages used in the Americas, where "America" does not mean the "United States."

As observed by Professor Edward Sapir of the University of Chicago and later of Yale University,

"No two languages are ever sufficiently similar to be considered as representing the same social reality." *Id.* at 91 (quoting D. MANDELBAUM (ed.), SELECTED WRITINGS IN LANGUAGE, CULTURE AND PERSONALITY BY EDWARD SAPIR (1949)). Nor could Courts require States to depart from English in their laws and regulations. Courts lack this authority to require States to depart from English. "Government of the people, by the people, and for the people" ensures that the people have the power to require that public school education be in a common language.

Translating key terms of the Constitution would modify them without complying with the amendment process. Moreover, translating the 200-plus years of judicial interpretations into a different language would change their meaning. Imagine the Supreme Court being required to review lower court opinions written in a different language. That would introduce substantial translation complexities – and interference with the judicial process. Courts could not circumvent the amendment process by promulgating the Constitution in a different language.

II. COURTS MUST ALTER INSTITUTIONAL-REFORM INJUNCTIONS UNSUPPORTED BY CURRENT FACTS AND LAW

This Court's precedents are clear on institutional-reform litigation judgments and decrees no longer supported by the current law or facts. Principles of federalism require federal courts to grant relief under FED. R. CIV. P. 60(b)(5) when the facts or law have changed sufficiently from those that purportedly justified entry of the judgment or

decree. *See, e.g., Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 385 (1992); *Frew v. Hawkins*, 540 U.S. 431, 441-42 (2004). A finding that a school violated federal law *in the past* cannot condemn a school system to "judicial tutelage ***for the indefinite future***." *Board of Educ. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 249 (1991) (emphasis added). Instead, when the school system has complied with the relevant law under the judgment or decree "for a reasonable period of time," the "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination." *Dowell*, 498 U.S. at 248 (interior quotations omitted). This is basic, and the Ninth Circuit ignored it.

Indeed, *Dowell* involves a school district previously held to have violated the Fourteenth Amendment with intentional discrimination. As explained in more detail in Section III, *infra*, this Court's flexible standard, sensitive to federalism concerns in institutional-reform litigation, is even more appropriate for violations of EEOA's vague "appropriate action" standard, which does not involve intentional discrimination under the Fourteenth Amendment. This Court should reverse the Ninth Circuit under the institutional-reform precedents and Rule 60(b)(5).

III. The Lower Courts Usurped the State and Local Governments' Roles of Determining How to Manage and Fund Public Education

Lacking the institutional expertise to serve as chancellors of education, the lower courts owe great deference to State and local government on the preeminently local preserve of education. Notwithstanding these factors, the lower courts not only commandeered English-language instruction in Arizona's schools but also – by claiming funding that Arizona would devote to other pressing educational needs – essentially commandeered Arizona's public education system.

While this is particularly egregious conduct in the annals of federal-court supervision of State and local schools, it becomes all the more egregious in consideration of EEOA's broad discretion for State and local governments to select an "appropriate action." As explained in Section IV, *infra*, a district court's only available remedy for a school that fails to provide "appropriate action" under EEOA is to order the school to take appropriate action. In other words, ***inaction*** is actionable. The choice from among the range of appropriate actions, however, rests solely in the school's discretion, not in a court's discretion.

Both federalism and separation of powers argues for extricating the courts from Arizona's schools, now that the underlying ELL deficiencies are cured. ***First,*** "local autonomy of school districts is a vital national tradition." *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 410 (1977). ***Second,*** even more than the federal government generally, federal judges

simply lack the institutional expertise needed to run school systems:

> Federal judges cannot make the fundamentally political decisions as to which priorities are to receive funds and staff, which educational goals are to be sought, and which values are to be taught. When federal judges undertake such local, day-to-day tasks, they detract from the independence and dignity of the federal courts and intrude into areas in which they have little expertise.

Missouri v. Jenkins, 515 U.S. 70, 133 (1995) (Thomas, J., concurring) (citing Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978)). For the lower courts to have involved themselves to this extent in Arizona's school systems is genuinely remarkable.

Moreover, the lower courts' "throw money at the problem" solution not only would waste money but also would detract from other educational priorities. Indeed, as the Superintendent argues, the evidence is uncontroverted that (1) increasing funding without structural reforms would not have led to different outcomes; (2) Nogales' problems did not result from a lack of funding; and (3) the Nogales ELL program does not need more money. Superintendents' Br. at 23. Involving federal courts in this political process tarnishes the federal judiciary.

As President Nixon stated to Congress in his message forwarding the EEOA legislation, this Nation's history with federal decrees on school systems finds those decrees "sometimes sound, sometimes bizarre, but certainly uneven." 118 CONG.

REC. 8931 (1972). His intent and that of EEOA was that courts would get out of the business of running school systems by imposing only the remedy essential to correct the particular violation. *Id.;* 20 U.S.C. §1712. By going well beyond the remedy "***essential*** to correct particular denials of equal educational opportunity," 20 U.S.C. §1712 (emphasis added), the lower courts exceeded their authority under EEOA.

IV. COURTS MUST READ EEOA'S "APPROPRIATE ACTION" CONSISTENTLY WITH OTHER FEDERAL LEGISLATION

Eagle Forum ELDF agrees with the petitioners that Arizona's compliance with NCLB places it well outside a court's prerogative to find Arizona's actions ***inappropriate*** under EEOA. In addition to its agreement with petitioners, however, Eagle Forum ELDF adds two important points. ***First,*** if no federal statute cabins the determination of what constitutes "appropriate action," EEOA raises a non-justiciable political question placed entirely within the hands of the implementing educational and legislative authorities. ***Second,*** even before NCLB, federal statutes contemporaneous with EEOA provided governing principles that demonstrate Arizona's compliance with EEOA.

Even if this Court did not have an ***obligation*** to look to NCLB and other federal law to flesh out EEOA's appropriate action, the availability of such standards avoids what otherwise would be nonjusticiable for want of "any law to apply." *Chrysler Corp. v. Brown*, 441 U.S. 281, 317-18 (1979). Thus, either because it can or because it must, this

Court should look to NCLB and other federal law to define and confine EEOA's otherwise amorphous requirements.

A. Without Governing Principles, EEOA's Appropriate Action Is Non-Justiciable

Assuming *arguendo* that no federal legislation cabins the definition of "appropriate action" under EEOA, that aspect of EEOA would not be justiciable, either because it presents a political question or it is an issue committed to the discretion of educational and legislative officials. The political-question doctrine arises out of the same Article III limitations on federal courts' powers as standing, mootness, and ripeness, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352-53 (2006), and so would require dismissal of this litigation:

> On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first, of this court, and ***then of the court from which the record comes***. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it. The requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception.

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94-95 (1998) (emphasis added, citations and interior quotations omitted). So "if the record discloses that the lower court was without

jurisdiction," appellate courts such as this Court "have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Steel Co.*, 523 U.S. at 95. As explained below, and again assuming *arguendo* that no federal legislation cabins a court's determining what constitutes "appropriate" action, EEOA §1703(f) is non-justiciable.

Some legal questions are "entrusted to one of the political branches or involve no judicially enforceable rights." *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004) (plurality opinion of Scalia, J.). As Justice Kennedy explained in his concurring opinion, "courts must be cautious about adopting a standard that turns on whether the partisan interests in the redistricting process were excessive" because "[e]xcessiveness is not easily determined." *Vieth*, 541 U.S. at 316 (Kennedy, J., concurring). Like excessiveness, appropriateness is not easily determined from among the accepted means of educating students. As the only unelected branch of government, courts are the *least* fit to answer such questions. *Luther v. Borden*, 48 U.S. 1, 52-53 (1849) ("making judges supreme arbiters in political controversies ... [would] dethrone [the people] and lose one of their ... invaluable birthrights"). In the absence of federal law to apply to determine whether a school's chosen action is "appropriate action," this Court should dismiss this action as a non-justiciable political question.

In addition to being non-justiciable as a political question, the selection of an "appropriate action" also is committed to the discretion of educators and legislators because there is no law for a reviewing

court to apply when choosing among appropriate actions. Although this variety of nonreviewability frequently arises under the federal Administrative Procedure Act ("APA"), *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971), EEOA presents the same problem: "review is not to be had if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Indeed, these cases predate the APA, *Gray v. Powell*, 314 U.S. 402, 412 (1941), and form a "common law" of "nonreviewability." Kenneth Culp Davis, *"Nonreviewable Administrative Action,"* 96 U. PA. L. REV. 749, 750-51 (1948). Review is particularly outside judicial expertise when, as here, "the duty to act turns on matters of doubtful or highly debatable inference from large or loose statutory terms." *Panama Canal Co. v. Grace Line, Inc.*, 356 U.S. 309, 318 (1958). For the foregoing reasons, while Eagle Forum ELDF does not doubt that a court could review a school's ***failure to act***, EEOA does not provide the law to apply for a court to find whether one action is more appropriate than another.

A rule that limits judicial review of EEOA compliance to ensuring the selection of a presumptively appropriate form of English language education is consistent with the Court's precedents on actionable inaction. *See, e.g., City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989) ("inadequacy of police training may serve as the basis for §1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with

whom the police come into contact"); *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (inaction litigable under 5 U.S.C. §706(1) "only where a plaintiff asserts that an agency failed to take a ***discrete*** agency action that it is ***required to take***") (emphasis in original); *Gomez v. Illinois State Board of Education*, 811 F.2d 1030, 1143 (7th Cir. 1987) ("[a]lthough the meaning of 'appropriate action' may not be immediately apparent without reference to the facts of the individual case, it must mean something more than 'no action'"). This Court should apply the same reasoning and limit EEOA "appropriate action" litigation to ensuring that schools have adopted ***an*** appropriate action, from among the wide array of actions available to schools.

Eagle Forum's ELDF's proposed rule is consistent with §1712's limiting remedies to those "***essential*** to correct particular denials of equal educational opportunity." 20 U.S.C. §1712 (emphasis added). The remedy essential to correct denial of an "appropriate action" is to require the school to take ***an*** appropriate action: courts do not have a say in ***which*** appropriate action. Finally, the rule is at least congruent with the *Pickard* three-part test, *Castaneda v. Pickard*, 648 F.2d 989, 1009-10 (5th Cir. 1981), although Eagle Forum ELDF respectfully submits that a court's analysis of the second and third tests must be extremely deferential.

As explained above – assuming *arguendo* that federal legislation does not cabin courts' discretion in evaluating the appropriateness of State and local action – EEOA §1703(f) would not be justiciable. As explained in the next two sections however, both

before and after NCLB, federal law ***has*** cabined the otherwise vague term "appropriate," and Arizona's actions unquestionably fall within that term.

B. NCLB Provides Governing Principles

The Speaker of the House, President of the Senate, and Superintendent argue persuasively that, in enacting NCLB's Title III in 2002, Congress necessarily made Nogales' (and Arizona's) NCLB-compliant actions "appropriate" for EEOA purposes. *See* Legislative Petitioners' Br. at 51-57; Superintendent's Br. at 51-61; *cf. Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 380-81 (1969) ("[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction"). Eagle Forum ELDF wholeheartedly supports their arguments and need not repeat them.

Based on their arguments at the petition stage, Arizona Opp'n, at 16; Flores Opp'n, at 27, the respondents presumably will counter by citing two NCLB savings clauses (20 U.S.C. §§6845, 6847) for the proposition that NCLB expressly did not undo either EEOA itself or any decrees under EEOA. Specifically, §6845 provides that nothing in ELALEAAA "require[s] a State or a local educational agency to establish, continue, or eliminate any particular type of instructional program for limited English proficient children," and §6847 provides that nothing in ELALEAAA "shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. §§6845(2), 6847. These savings clauses do not save the respondents for two independent reasons.

First, these savings clauses simply do not address the thrust of the argument that the Speaker of the House, President of the Senate, and Superintendent make. No-one argues that NCLB either ***requires*** the elimination of EEOA-compliant programs or ***amends*** EEOA by implication in a manner inconsistent with the pre-NCLB EEOA. Instead, the petitioners and Eagle Forum ELDF argue that NCLB provides an authoritative – indeed, controlling – statutory context for the scope of EEOA's "appropriate action" with respect to English instruction. To hold otherwise, this Court must find that, in NCLB, Congress enacted an inappropriate action. Eagle Forum ELDF respectfully submits that it falls well outside the courts' institutional expertise to make that finding.

Second, as explained in the next section, pre-NCLB federal legislation ***already*** elevated Arizona's English immersion program as "appropriate" under EEOA. While Eagle Forum ELDF agrees with petitioners that the NCLB savings clauses do not negate NCLB's ability to define or cabin "appropriateness" under EEOA, the savings clauses certainly do not render ***inappropriate*** that which ***already was appropriate,*** prior to NCLB's enactment. *See Morton v. Mancari,* 417 U.S. 535, 549-51 (1974) (repeals by implication are disfavored); *accord* 20 U.S.C. §§6845(2) (NCLB does not deprive Nogales of right to rely on actions deemed appropriate, prior to NCLB's enactment). For the reasons explained in the next section, therefore, Arizona's English immersion "actions" certainly are "appropriate" under EEOA.

C. PRE-NCLB LAWS PROVIDED GOVERNING PRINCIPLES

Federal statutory actions contemporaneous with EEOA's enactment and prior to NCLB's enactment also provide governing principles on which federal courts must base their determination of what actions are "appropriate actions." As such, the question is not whether plaintiffs lost on this issue in the 1990s, before the consent decree, versus in the 2000s, with NCLB's enactment after the consent decree. Plaintiffs lost this issue in the 1980s, if not in the 1970s.[4]

By enacting both EEOA and the Bilingual Education Act in the Education Amendments of 1974, Congress plainly set up a situation where the general provisions of §1703(f)'s requirement of "appropriate action" would be cabined by what the Bilingual Education Act required, prohibited, and allowed. "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *U.S. v. Heirs of Boisdoré,* 49 U.S. (8 How.) 113, 122 (1849); *Offshore Logistics, Inc. v.*

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[4] As indicated in the prior section, because federal law ***already*** cabined "appropriate action" to include English immersion, this Court must reject respondents' argument that, as enacted in 2002, 20 U.S.C. §6847 somehow prevents petitioners' relying on NCLB's remedial scheme to provide governing principles on "appropriate action" under EEOA.

Tallentire, 477 U.S. 207, 220-21 (1986) (same); *cf. Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) ("specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment"). Under these precedents, common sense, and the respect that courts owe to Congress, this Court should read EEOA in conjunction with the Bilingual Education Act, as amended.

Courts read statutes as a whole not only because they owe that respect to the co-equal branch that wrote the statute but also to avoid "untenable" or "unreasonable" interpretations. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible"). Indeed, *American Tobacco* involved this Court's rejection of a federal agency's interpretation of a statute that "would make it illegal to adopt, and in practice to apply, seniority systems that fall within the class of systems protected by the provision." *Id.* That is exactly the untenable situation here: a district judge has interpreted EEOA to prohibit a form of English instruction expressly allowed by Congress.

Specifically, in 1984, Congress expressly amended the Bilingual Education Act to "declare[] it to be the policy of the United States, in order to establish equal educational opportunity for all children and to promote educational excellence ... to encourage the establishment of special alternative instructional programs for students of limited English proficiency in school districts where the establishment of bilingual education programs is not

practicable or for other appropriate reasons." PUB. L. NO. 98-511, §201(a) , 98 Stat. 2366, 2370-71 (1984); *accord* PUB. L. NO. 100-297, §7002(a), 102 Stat. 130, 275 (1988) (same); S. REP. NO. 100-222, at 77, *reprinted in* 1988 U.S.C.C.A.N. 101, 178 (1984 Bilingual Education Act amendments authorized federal funding for "special alternative instructional programs" such as "English as a Second Language" and "structured immersion"); H.R. REP. NO. 98-748, 7, *reprinted in* 1984 U.S.C.C.A.N. 4036, 4042 ("new category of special alternative instructional programs for LEP children is established as an alternative to transitional or development programs [that] might include approaches such as English-as-a-Second Language (ESL) or structured immersion"). The "special alternative instructional" or "SAI" program – including immersion – remained part of the Bilingual Education Act from 1984 through NCLB's enactment. *See* PUB. L. NO. 103-382, §7112, 108 Stat 3518, 3719-20 (1994) (1994 amendments). As such, respondents and the lower courts cannot evade immersion through NCLB's savings clauses.

In introducing the Bilingual Education Act amendments ultimately enacted in 1988, Representative Jeffords expressed the sentiment behind SAI programs:

> It is not the role of the Federal Government to dictate the method of instruction to be used at the local level, but rather to establish policy which supports the attainment of English language proficiency by the target population.

132 CONG. REC. H1709 (daily ed. Apr. 9, 1986) (Statement of Rep. Jeffords). In doing so, Congress not only expressly amended the Bilingual Education Act, but also impliedly amended the scope of "action" deemed "appropriate" under EEOA. *See, e.g., Erlenbaugh v. U.S.*, 409 U.S. 239, 243 (1972) (statutes "in *pari materia* – that is, [statutes that] pertain to the same subject – ... under settled principles of statutory construction, should ... be construed as if they were one law"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) ("subsequent acts can shape or focus th[e] meanings" of prior statutes); *U.S. v. Estate of Romani*, 523 U.S. 517, 530-31 (1998). The "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." *U.S. v. Fausto*, 484 U.S. 439, 453 (1988). Under that classic judicial task, this Court must find that Congress has deemed English immersion as an "appropriate action" *per se*.

English immersion is undeniably an educational method that works, that Congress has authorized, and that preserves our national identity. While it is not the Congress' role to dictate State methods of instruction, it even more strongly is not the role of a federal judge to do so. Because the Bilingual Education Act consistently allowed English immersion as a means of instruction from 1984 through the enactment of NCLB in 2002 (and since), Eagle Forum ELDF respectfully submits that the plaintiffs and the district court have it precisely

backwards. The question is not whether NCLB's savings clause in §6845(2) protects their injunction under EEOA. *See* 20 U.S.C. §6845(2) ("[n]othing in this part shall be construed ... to require a State or a local educational agency to ... eliminate any particular type of instructional program for limited English proficient children"). The question is whether §6845(2) prohibits anyone's denying that English immersion is an "appropriate action" under federal law.

The answer is that §6845(2) plainly prohibits courts from denying schools the right to use English immersion. *Id.; see also* 20 U.S.C. §1712 ("court ... shall seek or impose only such remedies as are ***essential*** to correct particular denials of equal educational opportunity" under EEOA) (emphasis added). Because English immersion is *per se* an appropriate action, a court simply lacks discretion under EEOA to require anything else from a school that provides English immersion. Under the circumstances, this case is not an instance of merely ***disfavoring*** repeals by implication, *Morton,* 417 U.S. at 549-50, but one where the Court "should be particularly hostile to [repeals by implication because] the allegedly repealing statute ***specifically rules them out.***" *Jett v. Dallas Independent School Dist.,* 491 U.S. 701, 746 (1989) (emphasis added). Following 25 years of congressional policy, this Court must accept immersion as an "appropriate action."

CONCLUSION

For the foregoing reasons and those argued by the petitioners, this Court should reverse the Ninth

Circuit's decision and remand with instructions to vacate the district court's injunction.

Respectfully submitted,

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